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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

BEAN DREDGING CORPORATION,

Petitioner,

vs.

MARTHA B. OLSEN, COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE WESTERN GRAND DIVISION AT JACKSON

VOLUME I

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QUESTION PRESENTED FOR REVIEW

Whether the Tennessee Supreme Court's reversal of the Judgment of the Chancery Court for Shelby County, Tennessee, and the Tennessee Supreme Court's interpretation of certain provisions of the Tennessee Sales and Use Tax Laws, violates the Commerce Clause of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE WESTERN GRAND DIVISION AT JACKSON

Petitioner prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Tennessee, Western Grand Division at Jackson, entered in these proceedings on December 14, 1987.

OPINIONS BELOW

The Judgment and Opinion of the Tennessee Supreme Court at Jackson are reproduced, respectively, at Appendix 1 and 2 of this Petition.

The Final Decree and Memorandum Opinion (unpublished) of the Chancery Court for Shelby County, Tennessee, are reproduced at Appendix 36 through 40 of this Petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). The Judgment of the Tennessee Supreme Court at Jackson was entered on December 14, 1987. This Petition is timely filed pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .
U.S. Const. Art. I, § 8, cl. 3.

United States Code

Title 33 U.S.C. §§ 1, 4, 419, 622(a) and (b) are reproduced *in globo* at Appendix 273 through 277 of this Petition.

Tennessee Statutes

Tennessee Sales and Use Tax Laws, Tenn. Code Ann. tit. 67, §§ 67-6-101 through 67-6-712 (formerly codified as Tenn. Code Ann. §§ 67-3001 through 67-3048) are reproduced *in globo* at Appendix 88 through 273 of this Petition.

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STATEMENT OF THE CASE

This case presents the question whether the Tennessee Supreme Court's reversal of the Judgment of the Chancery Court for Shelby County, Tennessee, and the Tennessee Supreme Court's interpretation of certain provisions of the Tennessee Sales and Use Tax Laws, violates the Commerce Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl. 3.

The facts of the case are not in dispute, although the legal conclusions drawn from the facts by the Tennessee Supreme Court and the ramifications for the free flow of interstate commerce are of the essence of this Petition.

Petitioner, Bean Dredging Corporation, is a Louisiana corporation primarily engaged in the dredging and maintenance of various navigable waterways, including the Mississippi River.

Petitioner owns and operates the vessel *Lenel Bean*, a self-propelled dustpan dredge, independently capable of navigation, propulsion and storage. A dustpan dredge sucks dredge material up through a pan in the front of the vessel and transports the material through a pipeline out to a spoil or discharge area. A dustpan dredge, by its

nature, is constantly in motion while dredging activities are conducted. A dustpan dredge is suited to dredging activity normally associated with maintenance of ship channels in rivers and streams. The *Lenel Bean's* attendant plant handles pipeline, barges and anchors, and carries supplies and personnel to monitor the shoal before, during and after the dredging process. The *Lenel Bean* was specifically designed for maintenance of the Mississippi River and is unique to private industry, with all other dustpan dredges in the United States being owned by the United States Corps of Engineers. By contrast, the vast majority of "cutterhead" and all "clam shell" dredges are stationary at all times during dredging activities and are suited more particularly to harbor maintenance and excavation, none of which occurred in this case.

The United States Corps of Engineers has exclusive police power to prescribe rules and regulations for the use, administration and navigation of the navigable waters of the United States, including the Mississippi River, and the jurisdiction of the Corps of Engineers covers, *inter alia*, channel maintenance, uninterrupted gauging of the waters, dredging and dumping to preserve the free flow of navigation. 33 U.S.C. §§ 1, 4 and 419. The Corps of Engineers is authorized to carry out projects for the improvement of rivers and harbors in the manner most economical to the United States and may contract with private industry to perform the work if it can be done timely and at reasonable prices. 33 U.S.C. § 622(a). Although the Corps of Engineers maintains a federally owned fleet of dredges, as private industry demonstrates its ability to

perform the same function as the federal fleet in a timely and cost-effective manner, the Corps of Engineers has received a Congressional mandate to contract with private industry to perform dredging activities to reduce the size of the federally owned fleet of dredges. 33 U.S.C. § 622(b).

Pursuant to this Congressional mandate, the Corps of Engineers contracted with Petitioner during the years 1980 through 1982 for the use of the *Lenel Bean* to perform dredging operations to the specifications of the Corps between Mississippi River Mile 599 and River Mile 800, and to remain at all times on standby ready to proceed on five days notice by the Corps. Mississippi River Mile 599 marks the southern boundary of the Memphis District of the Corps of Engineers and is located south of the Tennessee state line at the mouth of the White River in Arkansas. Mississippi River Mile 800 is immediately upstream from Oceola, Arkansas. Thus, it was necessary for the *Lenel Bean* to navigate upon the Mississippi River and cross state lines on a daily basis in order to perform its contractual commitments to the U.S. Government. Furthermore, in order to monitor the vessel's position, a number of shore stations were set up on each bank of the river in different states in order to transmit and receive radio signals to and from the dredge and the computer on board to maintain proper position in the river. It was not unusual for the *Lenel Bean* to remove dredge material from one state and deposit the same material in a different state as part of its daily activities. In fact, the contract covered dredging responsibilities in the State of Arkansas in twelve different counties, in the State of Mississippi in ten different counties, as well as in the State of Tennessee in sixteen different counties.

Pursuant to the contract between Petitioner and the U.S. Corps of Engineers, the Corps of Engineers at all times designated the area of the river to be dredged, the quantity of material to be removed and transported and the precise disposal area. Pursuant to the federal contract, Petitioner transported Corps of Engineers radios, equipment and personnel to and from Petitioner's vessels from all points on shore designated by the Corps and provided Corps personnel with meals and accommodations.

The ship channels of the Mississippi River undergo continuous change as a result of the constant deposit of silt and shoal material. Consequently, dredging activities to maintain the ship channel cannot precisely be determined in advance but must occur over an extended period of time and the decisions made by the U.S. Corps of Engineers as to the location of dredging activities, the amount of material to be removed and the placement of the spoil must be made as the work progresses, with dredging assignments subject to continuous modification and adjustment. Accordingly, dredging assignments were often upstream, downstream and at non-contiguous locations. As soon as work was completed at one site, the dredge was required by the Corps of Engineers to relocate to another site to commence a new assignment. At all times, Petitioner was required to mobilize to an assigned location within five days notice from the Corps of Engineers.

During periods of high water, Petitioner was required by the Corps of Engineers to remain on standby but be prepared to dredge where, when and as directed on five days notice. Petitioner arbitrarily chose McKellar Lake, a navigable harbor on the Mississippi River, because it

was the most convenient harbor to the section of the river for which Petitioner was responsible. Petitioner was obligated to maintain the vessel in a state of readiness at all times. Necessary crew were kept on board. Required lines, lights and safety checks were tested, and engines and equipment were maintained in a state of readiness. Vessel generators and electrical systems were operated at all times and vessel documents and licenses were maintained in order to keep the vessel available on five days notice to respond to the requirements of the U.S. Corps of Engineers pursuant to the federal contract.

The Commissioner of Revenue of the State of Tennessee assessed Petitioner with use tax levied on the *Lenel Bean* and its attendant plant for the period from January 1, 1980 to December 31, 1982. On August 18, 1983, Petitioner paid under protest $400,037.41 of Tennessee use taxes, $71,505.67 of interest and $100,009.35 of penalties. Appendix 84 and 85.

Petitioner timely filed a suit for refund on December 14, 1983, alleging exemption under applicable Tennessee tax statutes and further alleging, *inter alia,* as follows:

> The imposition of use taxes by the State of Tennessee on dredging vessels used in interstate commerce within and without this State is an unconstitutional encroachment on the power of the Congress of the United States to regulate commerce among the several states

under Article I, Section 8 of the United States Constitution.

See Appendix 80, Par. 13.

Trial was held on May 6, 1986, in Part III of the Chancery Court of Shelby County before the Honorable Chancellor D.J. Alissandratos and Judgment was rendered on the same day. The Chancellor found, as a matter of fact, that Petitioner, at all times in question, was engaged in interstate commerce and that its entire activity, including intermittent and sporadic standby time at Lake McKellar at the direction of the U.S. Corps of Engineers, was for the furtherance and preservation of the navigation of the entire Mississippi River waterway. Accordingly, the Chancellor ordered that the State of Tennessee must refund to Petitioner a total of $571,552.43 of use tax, interest and penalty, together with applicable interest. Appendix 37.

The State of Tennessee appealed directly to the Tennessee Supreme Court according to applicable state law. On December 14, 1987, the Tennessee Supreme Court entered a Judgment reversing the Judgment of the Chancery Court for Shelby County, Tennessee. Appendix 1.

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ARGUMENT

THE TENNESSEE SUPREME COURT'S REVERSAL OF THE JUDGMENT OF THE CHANCERY COURT FOR SHELBY COUNTY, TENNESSEE, AND THE TENNESSEE SUPREME COURT'S INTERPRETATION OF CERTAIN PROVISIONS OF THE TENNESSEE SALES AND USE TAX LAWS, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

I. Petitioner was engaged in interstate commerce at all times.

The Tennessee Sales and Use Tax Laws specifically exempt from sales and use tax vessels and barges of fifty tons or over of displacement which are purchased for use in interstate commerce or for use outside of the State of Tennessee, so long as such vessels are being used in interstate commerce. Tenn. Code Ann. § 67-6-321 (formerly Tenn. Code Ann. § 67-3012).

This case was the first opportunity for the Tennessee courts to apply the Tennessee Sales and Use Tax Laws to dredging activities. The only prior occasion where a Tennessee court applied the statute with regard to maritime activities generally was in *T. L. Herbert & Sons, Inc. v. Woods,* 539 S.W. 2d 28 (Tenn. 1976), where the Tennessee Supreme Court ruled that a towboat purchased in Louisiana and brought to Tennessee to service the Nashville harbor was exempt from Tennessee use tax since it was engaged in interstate commerce, even though the vessel rarely, if ever, ventured outside the territorial waters of the State of Tennessee, had come to rest within the state and become part of the mass of property used in Tennessee.

In its original complaint, Petitioner pled the provisions of the Commerce Clause. However, its protections should not have been necessary in view of the clear authority provided by the Tennessee Sales and Use Tax statute, particularly Tenn. Code Ann. § 67-6-313(a) (formerly Tenn. Code Ann. § 67-3007), as well as the holding in *Herbert*. Accordingly, in its argument at trial and on appeal to the Tennessee Supreme Court, Petitioner stressed the Tennessee statutory provisions and their interpretation by the Tennessee Supreme Court in *Herbert*. The Tennessee statutory provisions and the prior holding in *Herbert* were consistent with the principles of the Commerce Clause.

The Tennessee Supreme Court erroneously reversed the Judgment of the Chancery Court of Shelby County despite the compelling facts of the case, the clear directive of the Tennessee Sales and Use Tax statute and its own prior precedent, based upon a novel and, we respectfully submit, unsophisticated view of dredging as inherently local, analogous to the repair of an interstate highway.

In interpreting and applying the Tennessee Sales and Use Tax Laws, the Tennessee Supreme Court ignored the fact that the maritime dredging industry involves a number of varied types of activities, some of which are not susceptible to expedient classification as inherently "local."

The *Lenel Bean* was specifically designed, maintained and operated to keep ship channels of the Mississippi River navigable. The dredge is called upon to move from place to place along the river where, when and as needed, and the vessel is in constant movement during dredging operations.

Conversely, harbor excavation or construction dredging activities involve dredges of completely different design and operation. These dredges, known as "clam shell," "bucket" and "cutterhead" dredges, remain fully stationary at all times and remove dredged material in predetermined amounts and locations.

The Tennessee Supreme Court failed to make any distinction whatsoever between these two types of dredging activities and cited as its authority for the local nature of dredging activities a number of cases, each of which involved stationary harbor maintenance or construction activity, and none of which involved dustpan dredge activity. *See,* for example, *Great Lakes Dredge & Dock Co. v. Department of Taxation and Finance,* 39 N.Y.2d 75, 346 N.E.2d 796, 382 N.Y.S.2d 958 (1976), *cert. denied,* 429 U.S. 832 (1976); *Atlantic Gulf & Pacific Co. v. Gerosa,* 16 N.Y.2d 1, 209 N.E.2d 86, 261 N.Y.S.2d 32 (1965), *appeal dismissed,* 382 U.S. 368 (1965); *Great Lakes Dredge & Dock Co. v. Norberg,* 117 R.I. 600, 369 A.2d 1101 (1977); and *Diversacon Industries, Inc. v. Graham,* 429 So.2d 1269 (Fla. App. 1983), cited by the Tennessee Supreme Court.

Petitioner was engaged in interstate commerce on a continuous basis at all times material hereto. Prior efforts of state taxing authorities to unlawfully tax interstate commerce, supported by opinions of the taxing state's highest court that the activity taxed is inherently "local" and thus immune from Constitutional protection, have been struck down as violative of the Commerce Clause. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396 (1954). Additionally, the fact that Petitioner's vessel remained on standby in Lake

McKellar awaiting further instructions of the Corps of Engineers, does not remove the vessel from interstate commerce, since this activity is so integrated with Petitioner's dredging activities that it is insusceptible of realistic division into a separate and distinct local activity capable of forming a basis for taxation, in much the same way that receiving and landing passengers and freight may not be isolated from their transportation in interstate commerce or the momentary storage or treatment of natural gas may not be segregated from its ultimate transmission through an interstate pipeline. *See, Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396 (1954); *Gloucester Ferry Co. v. Pennsylvania,* 114 U.S. 196, 29 L.Ed. 158, 5 S.Ct. 826 (1885); *Maryland v. Louisiana,* 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981).

This Court has long ago rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause analysis because it attaches only to a "local" or alleged intrastate activity. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981).

Consequently, the decision of the Tennessee Supreme Court in this case results in the imposition on Petitioner of a use tax on interstate commerce which violates the Commerce Clause of the United States Constitution. A review by the Court is necessary and appropriate.

II. The Commerce Clause prohibits the tax.

Although it is well settled that "interstate commerce may be made to pay its way" and that a state tax on interstate commerce is not per se invalid, a state's right

to tax interstate commerce is limited and must not be sustained unless the tax: (a) has a substantial nexus with the State; (b) is fairly apportioned; (c) does not discriminate against interstate commerce; and (d) is fairly related to the services provided by the taxing state. *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977); and *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977). Failure of any one or more of these four tests renders the tax unconstitutional as violative of the Commerce Clause. The tax as applied by the Tennessee Supreme Court in this case fails three of the four tests, namely, it is not fairly apportioned, it discriminates against interstate commerce and is not fairly related to the services provided by the taxing state.

A. The tax is not fairly apportioned.

Although the *Lenel Bean* routinely entered into the States of Arkansas and Mississippi as well as the State of Tennessee and moved dredged material from one state to another across state lines on a constant basis, all at the direction of the Corps of Engineers, the Tennessee use tax is based upon the "cost price" of the entire dredge without any allocation, exemption, deduction or credit for use of the vessel outside of the State of Tennessee. Tenn. Code Ann. § 67-6-203 (formerly Tenn. Code Ann. § 67-3003). The Tennessee Sales and Use Tax Laws provide no protection to Petitioner against a similar, duplicative tax by either Mississippi, Arkansas, or both.

It is well settled that a state tax on interstate commerce must be fairly apportioned and limited to the taxed

property's use within the taxing state in order to supersede the Constitutional protection of the Commerce Clause. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L.Ed. 823, 58 S.Ct. 546 (1938); *Maryland v. Louisiana,* 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). The nature of Petitioner's dredging activities exposes Petitioner to multiple state use taxation and the imposition of tax by any of the states would renew barriers to interstate commerce which the Commerce Clause was designed to remove. *See, Western Live Stock, supra,* and the jurisprudence cited therein. This Court has upheld State taxation of interstate commerce, but only where the state statute limited the tax to activities within its borders. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977); *Portland Cement Co. v. Minnesota,* 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959); *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 55 L.Ed.2d 682, 98 S.Ct. 1388 (1978); *Western Live Stock,* 303 U.S. 250, 82 L.Ed.2d 823, 58 S.Ct. 546 (1938); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981); *American Trucking Assns. v. Scheiner,* 483 U.S. —, 97 L.Ed.2d 226, 107 S.Ct. 2829 (1987).

B. The tax discriminates against interstate commerce.

The Tennessee Supreme Court's failure to follow its own holding in *T.L. Herbert & Sons v. Woods,* 539 S.W.2d 28 (Tenn. 1976) and its erroneous classification of all dredging activities as inherently "local" have resulted in a direct discrimination against interstate commerce.

In *Herbert*, the taxpayer, *a Tennessee corporation*, purchased a towboat in Louisiana which, under Louisiana law, was exempt from Louisiana sales tax. The towboat was brought into the State of Tennessee to engage in towing activities in Nashville harbor, rarely, if ever, leaving the State of Tennessee. The Tennessee Supreme Court found that the activities in the harbor were local and even went so far as to find that the boat came to rest in Tennessee and became part of the taxable mass of property used there. Nevertheless, the Tennessee Supreme Court easily concluded that the towboat was at all times in interstate commerce and that the taxpayer, *a Tennessee corporation*, owed no use tax since the activities were within the statutory exemption.

Petitioner, *a Louisiana corporation*, acquired the *Lenel Bean* under an exemption from Louisiana sales tax. Petitioner entered into a federal contract with the Corps of Engineers to dredge the Mississippi River across state lines on a continuous basis and to remain on standby to proceed on five days notice by the Corps. By pure happenstance, Petitioner selected McKellar Lake as the most convenient place to remain on standby and still fulfill its continuing obligations to the Corps. In applying the same statute as in *Herbert* to Petitioner, a *Louisiana taxpayer*, the Tennessee Supreme Court ignored the compelling facts of this case and erroneously misclassified Petitioner's dredging activities as inherently local and Petitioner's standby time as removal from interstate commerce. The holding of the Tennessee Supreme Court and the reasons for judgment are bootstrap arguments. This result-oriented interpretation of Tennessee law is nothing more

than a diaphonous effort by the State of Tennessee to discriminate against interstate commerce, in general, and against Petitioner, in particular, all in violation of the Commerce Clause.

The obvious economic result of the holding of the Tennessee Supreme Court is to encourage out-of-state maritime and dredging contractors to relocate operations in Tennessee by protecting in-state business from tax, while discouraging out-of-state competition. No state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. Equal treatment for in-state and out-of-state taxpayers similarly situated is a condition precedent to a valid state use tax on property imported from out-of-state. *Best & Co. v. Maxwell,* 311 U.S. 454, 85 L.Ed. 275, 61 S.Ct. 334 (1940); *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 10 L.Ed.2d 202, 83 S.Ct. 1201 (1963); *Portland Cement Co. v. Minnesota,* 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959); *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977); *Maryland v. Louisiana,* 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981); *Westinghouse Electric Corp. v. Tully,* 466 U.S. 388, 80 L.Ed.2d 388, 104 S.Ct. 1856 (1984); *Armco, Inc. v. Hardesty,* 467 U.S. 638, 81 L.Ed.2d 540, 104 S.Ct. 2620 (1984); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 82 L.Ed.2d 200, 104 S.Ct. 3049 (1984).

C. The Tax is not fairly related to the services provided by Tennessee.

Petitioner's contract with the U.S. Corps of Engineers was funded federally, not by the taxpayers of the

State of Tennessee. At all times, Petitioner was subject to the direct control and supervision of the federal government through the Corps of Engineers. The activities of Petitioner aided navigation for the entire Mississippi River and thus benefitted the economies of every state in the Mississippi River Valley. The position of McKellar Lake within the boundaries of the State of Tennessee was entirely serendipitous. While on standby in McKellar Lake, Petitioner paid all applicable sales tax to the State of Tennessee for vessel repairs, supplies, maintenance, etc. Thus, Petitioner's debt to the State of Tennessee was fully discharged. It paid all sales taxes rationally related to any services provided to Petitioner while in the state such as police and fire protection, the furnishing of a trained work force and the "advantages of a civilized society." *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981). Imposition of an additional use tax as a percentage of the entire value of the *Lenel Bean* and its attendant plant cannot be rationalized as just compensation to the State of Tennessee, as opposed to the States of Arkansas and/or Mississippi or any other state in the Mississippi Valley. Such additional tax would be disproportionate and in clear violation of the Commerce Clause. *Armco, Inc. v. Hardesty,* 467 U.S. 638, 81 L.Ed.2d 540, 104 S.Ct. 2620 (1984).

In order to justify a use tax on interstate commerce as a compensatory tax, the state must first identify the burden on state government to be compensated. A state cannot satisfy this requirement if the use tax operates in a discriminatory manner. *Maryland v. Louisiana,* 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981); *Tyler*

Pipe Industries v. Department of Revenue, 483 U.S. —, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987). When the measure of a tax bears no relationship to the taxpayer's presence or activities in a state, the tax is an undue burden on interstate commerce. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981).

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CONCLUSION

The Tennessee Supreme Court's reversal of the Judgment of the Chancery Court for Shelby County, Tennessee, and its imposition of Tennessee use tax on Petitioner violates the Commerce Clause of the United States Constitution.

> As in *Great A & P Tea Co. v. Cottrell,* 424 U.S. 366, 47 L.Ed. 2d 55, 96 S.Ct. 923 (1976), we begin with the principle that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J. E. Dilworth Co.,* 322 U.S. 327, 330, 88 L.Ed. 1304, 64 S.Ct. 1023 (1944). It is now established beyond dispute that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit,* 329 U.S. 249, 252, 91 L.Ed. 265, 67 S.Ct. 274 (1946). The Commerce Clause does not, however, eclipse the reserved "power of the States to tax for the support of their own governments," *Gibbons v. Ogden,* 9 Wheat. 1, 199, 6 L.Ed. 23 (1824), or for other purposes, cf. *United States v. Sanchez,* 340 U.S.

> 42, 44-45, 95 L.Ed. 47, 71 S.Ct. 108 (1950); rather, the Clause is a limit on state power. *Defining that limit has been the continuing task of this Court.*

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977) (emphasis added).

Thus, the Tennessee use tax, as applied in this case, fails three of the four tests set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977) and, consequently, the tax violates the Commerce Clause.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BEAN DREDGING CORPORATION,	)	
Plaintiff-Appellee,	)	SHELBY EQUITY NO. 1 No. 90712-2(3) R.D.
vs.	)	
MARTHA B. OLSEN, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	)	REVERSED IN PART; CAUSE REMANDED.
Defendant-Appellant.	)	

JUDGMENT

(Filed Dec. 14, 1987)

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Shelby County, briefs and argument of counsel; upon consideration whereof, this Court is of opinion that in the judgment of the Court below there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and ajudged by this Court that the judgment of the Court below be reversed in part and the cause remanded to the Chancery Court of Shelby County for further proceedings not inconsistent with this Court's opinion, a certified copy of which will accompany the mandate on the remand.

Costs are taxed against the appellee, Bean Dredging Company, for which execution may issue.

12/14/87.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BEAN DREGING CORPORATION,	)	*For publication.*
	)	December 14, 1987
Plaintiff/Appellee,	)	
	)	Shelby Equity No. 1
vs.	)	Hon. D. J. Alissandratos, Chancellor.
MARTHA B. OLSEN, Commissioner of Revenue, State of Tennessee,	)	
Defendant/Appellant.	)	

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OPINION

(Filed December 14, 1987)

REVERSED IN PART:
CAUSE REMANDED.

HARBISON, J.

Appellee paid under protest and sued for refund of a use tax levied by the State upon a large dredge and a number of supporting vessels which appellee operated and docked on the Mississippi River within the borders of the

state. Exemption was claimed upon the basis that the equipment was being used in interstate commerce at all times during the tax years involved within the meaning of T.C.A. § 67-6-321.

The Chancellor allowed the exemption and ordered a refund. We reverse except for a small portion of the claim as stated later in this opinion.

The principal vessel, the *Lenel Bean*, is a self-propelled "dustpan" dredge of some 1,385 tons displacement. It was newly commissioned in 1979. Appellee paid neither a sales nor a use tax upon the purchase price of this vessel or upon any of the other supporting units involved in the case with one exception noted hereinafter.

During the three tax years involved in this case, 1980 through 1982, appellee held a large dredging contract with the United States Army Corps of Engineers, under which appellee was to dredge the channel of the Mississippi River between specific mile stations. The southerly terminal point lay south of the Tennessee state line at the mouth of the White River in Arkansas and the northerly one just upstream from Oceola, Arkansas. A significant portion of the territory lay within the borders of Tennessee.

The boundary between Tennessee and Arkansas lies generally in the Mississippi River; but because of shifts in the course of the river over many years, for some distance north of Memphis the river lies entirely within the boundaries of Tennessee. South of Memphis the state boundary runs generally down the middle of the river.

The navigation channel crosses from one side of the river to the other, and it frequently becomes clogged with

silt and spoil. Under its contract with the Corps, appellee was to keep the channel dredged during its contract period, the operations usually being conducted when the river was at low level. During periods of high water, the dredge and its accompanying vessels were not used. For several weeks during each of the tax years involved here, the equipment was docked in an old river segment, or oxbow lake, known as McKellar Lake, which lies entirely within the boundaries of Shelby County, Tennessee.

Each of the contracts which appellee held with the Corps was for a one-year period. All of the operations of apppellee were conducted at the direction of and under the supervision of Corps personnel. The design of the *Lenel Bean* was such that it dredged or vacuumed silt from the bottom of the navigation channel and pumped it out along a pipeline of about 1000 feet in length, lying across some twenty barges to "spoil" areas designated by the Corps of Engineers.

At no time during the three-year period involved here was the *Lenel Bean* or any of the other vessels dry-docked or taken completely out of service. There were significant periods of time during each year, however, when they were not in use in the dredging operations and when they were stored in McKellar Lake. During periods while the equipment was at anchor, maintenance and repairs would be performed as needed, although, as previously stated, the *Lenel Bean* itself was a very new and modern vessel. During protracted periods of docking, many members of the crew would be given leave and only a skeleton crew maintained aboard the equipment. At full strength

the *Lenel Bean* carried a crew of forty-five to forty-seven persons.

Undisputed testimony shows that the equipment was idle at the dock at McKellar Lake during the following periods:

May 27, 1980 through June 30, 1980
August 22, 1980 through August 31, 1980
November 7, 1980 through November 17, 1980
June 2, 1981 through July 19, 1981
November 1, 1981 through August 6, 1982
September 23, 1982 through December 31, 1982

The equipment was first brought into Tennessee territory on May 27, 1980. It is apparent from the dates listed above that there was one continuous period of over nine months, from November 1, 1981 through August 6, 1982, when the equipment was at anchor in McKellar Lake. Testimony at trial indicated that there was a long period of high water at that time when no dredging operations were required.

The contract between appellee and the Corps of Engineers required that the equipment be maintained in such a state of readiness that it could be dispatched within five days to any site within the contracted territory. While at anchor, the generators on the *Lenel Bean* supplied the units with power at all times; and the engines were started at least once each week to assure that they were in operating condition.

Appellee concedes that the operation of its property within Tennessee territory during the tax years involved was clearly sufficient to subject it to the taxing power of the state. There is no claim of exemption under the

Commerce Clause of the United States Constitution. Appellee relies solely upon the exemption contained in T.C.A. § 67-6-321 as follows:

> There shall be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the state of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce."

The principal case construing this statutory exemption is *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

In that case a towboat had been brought to the port of Nashville. The brief factual record before the Court, however, clearly showed that at all times the vessel was used in interstate commercial towing operations. There was no showing of any sustained period of idleness, and such facts as were adduced in summary judgment proceedings showed that at all times the vessel was used to transport cargo moving in interstate commerce.

Under those facts it was held that the vessel was exempt from the Tennessee use tax.

The facts of the present case are quite different. Appellee insists that when the vessel was actually engaged in dredging the river channel, it was engaged in interstate commerce. The Chancellor so held. As pointed out in the brief of appellant, there is substantial authority to the contrary. Numerous cases hold that dredging operations are local in nature and that they are not, in and of them-

selves, considered to be interstate commerce for the purposes of state and local taxation.

The facts of the present case are unusual, of course, in that the state line between Tennessee and Arkansas lies within the banks of the Mississippi River in parts of the contracted territory. The proof shows that at some times the dredge itself would be operating within Tennessee but that the designated spoil area at the end of the pipeline would lie in Arkansas. There is no question, however, that in the area north of Memphis both banks of the river now lie in Tennessee, and the entire operations in that area would take place within the boundaries of Tennessee.

One of the principal cases relied upon by appellant, holding that dredging operations are subject to local use taxes, is *Great Lakes Dredge & Dock Co. v. Department of Taxation and Finance*, 39 N.Y.2d 75, 346 N.E.2d 796, 382 N.Y.S.2d 958 (1976); *cert. denied*, 429 U.S. 832 (1976). *See also Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N.Y.2d 1, 209 N.E.2d 86, 261 N.Y.S.2d 32 (1965), *appeal dismissed*, 382 U.S. 368 (1965); *Great Lakes Dredge & Dock Co. v. Norberg*, 369 A.2d 1101 (R.I. 1977). A use tax was also upheld in the State of Florida in *Diversacon Industries, Inc. v. Graham*, 429 So.2d 1269 (Fla. App. 1983).

Many of these cases deal with the constitutional power of a state to levy a use tax; but, as previously stated, no such issue is presented here. It is clear from the factual record that the equipment involved in this case was not at all times engaged in interstate operations, since during at least part of the time it was operating wholly within the boundaries of Tennessee. We believe appellant cor-

rectly analogizes the dredging of a channel to the building of a road or bridge. Servicing an artery of interstate commerce is different from the actual transporting of goods through such an artery from the standpoint of state taxation.

Even if appellee's dredging operations could be classified as interstate commerce, however, obviously there were substantial periods of time during which the equipment was not so engaged but was at dock or storage in Shelby County.

T.C.A. § 67-6-211 provides that a tax is to be levied on

> "... the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state."

The term "use" is defined at T.C.A. § 67-6-102(18) as follows:

> "... the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of property in the regular course of business. ..."

The term "storage" is defined in T.C.A. § 67-6-102 (16) as:

> "... any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business. ..."

In our opinion the facts of this case show that the equipment of appellee was stored in Tennessee, within the

meaning of these statutes, for substantial periods of time during each of the tax years in question.

The case, in our opinion, is controlled by the decision in *Vector Company v. Benson,* 491 S.W.2d 612 (Tenn. 1973), where a company engaged in interstate commerce acquired a plane to use in business travel. Most of the flights of the plane were interstate. When not in operation, however, the plane was tied down or hangered at a Knoxville airport. A use tax assessment was sustained in that case and in the more recent case of *Service Merchandise Company, Inc. v. Jackson,* — S.W.2d — (Tenn. 1987), released for publication at Nashville on the 17th day of August, 1987.

In the latter case a plane was purchased by the taxpayer in the State of Delaware for use in corporate business travel. It was delivered to a representative of the taxpayer in New Hampshire and then brought to Tennessee where it was hangered at Nashville. Routine maintenance was performed in Nashville, and the pilots were also based there. Flights generally began or ended in Nashville, but only a very small percentage of the flights were intrastate. No use tax or sales tax had been paid on the equipment to any other state.

In our opinion the Commissioner of Revenue correctly determined that appellee was liable for the Tenneessee use tax under the facts shown in this case. It does appear, however, that after the suit was filed a determination was made that appellee had paid a use tax to the State of Louisiana on one of the smaller ancillary vessels. It is agreed by appellant that appellee is entitled to a credit

for the amount of this tax, plus any attributable interest and penalty.

Other than for this adjustment, in our opinion the Chancellor erred in sustaining the claim for refund. The action is dismissed at the cost of appellee, with the exception of the adjustment admittedly due to appellee for previously paid use tax. The cause will be remanded to the trial court for determination of that amount and for any other proceedings which may be necessary.

/s/ William J. Harbison, J.

Brock, C.J., Cooper and Drowota, JJ.,
and Matherne, Sp. J., concur.

IN THE SUPREME COURT OF TENNESSEE
WESTERN GRAND DIVISION
AT JACKSON

BEAN DREDGING CORPORATION,	)	
Plaintiff/Appellee,	)	
v.	)	SHELBY EQUITY NO. 1
MARTHA B. OLSEN, Commissioner of Revenue of the State of Tennessee,	)	
Defendant/Appellant.	)	

DIRECT APPEAL AS OF RIGHT FROM THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE, PART III, NO. 90712-3

BRIEF ON BEHALF OF APPELLEE BEAN DREDGING CORPORATION

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ISSUES PRESENTED FOR REVIEW

Appellee Bean Dredging Corporation respectfully submits that the issues involved in this appeal are as follows:

1. Is the Chancellor's finding that Appellee is engaged in interstate commerce, so as to trigger the applicability of Tenn. Code Ann. § 67-6-321, supported by the evidence in the Record?

2. Does the intermitten docking of the dredge *Lenel Bean* in a navigable waterway during periods of high water, while at all times maintaining its readiness to respond to (sic, order) orders of the Corps of Engineers, as required by contract, amount to a "storage for use or consumption in this state" which is subject to the Tennessee use tax in spite of the applicability of Tenn. Code. Ann. § 67-6-321?

———o———

STATEMENT OF THE CASE

This case involves the application of Tenn. Code Ann. § 67-6-321 to the activities of Appellee Bean Dredging Corporation (referred to hereinafter as "Appellee" or "Bean") under three contracts with the United States Corps of Engineers which required Appellee to perform dredging operations on the Mississippi River between Miles 599 and 800, necessitating the movement of Appellee's vessel in and out of the States of Tennessee, Arkansas, Mississippi and Louisiana. Stipulation of Facts, ¶¶ 6-7. Tenn. Code Ann. § 67-6-321 exempts from the Tennessee use tax vessels or barges of fifty (50) tons or over of displacement which are used in interstate commerce.

This case does not, as the Commissioner contends, focus on the "power" of Tennessee to tax these vessels, but turns instead upon the application of an exemption statute which covers Appellee's activities. It is not necessary to determine whether the State has the "power" to levy the tax because the activities involved are specifically exempted from taxation.

The period at issue extends from January 1, 1980 to December 31, 1982. The agents of the Commissioner originally gave notice of an assessment for that period in the amount of $733,059.00. Stipulation of Facts, ¶¶ 2-3. The assessment was subsequently revised, and on August 18, 1983, Appellee paid the revised assessment, which totaled $571,552.43, consisting of $400,037.41 in taxes, $71,505.67 in interest, and $100,009.35 in penalty. Stipulation of Facts, ¶¶ 4-5. The payment was made involuntarily and under protest. The parties have stipulated that proper

payment under protest was made and that Appellee preserved its rights under the statutes existing at the time. Stipulation of Facts, ¶ 5.

A suit for refund was filed on December 14, 1983 and a trial was held on May 6, 1986 in Part III of the Chancery Court of Shelby County before the Honorable Chancellor D. J. Alissandratos. At the conclusion of the trial an opinion was rendered in favor of Appellee and a Final Order was entered in accordance with that opinion on May 21, 1986, ordering a refund of all amounts paid under protest. The Final Order, which incorporates the opinion, is attached hereto as Appendix "I."

A Notice of Appeal was filed on June 16, 1986 by the Commissioner of Revenue and the record was filed with this Court on September 24, 1986.

STATEMENT OF THE FACTS

Appellee Bean Dredging Corporation is a corporation organized under the laws of the State of Louisiana. Stipulation, ¶ 1. Bean engages principally in dredging operations on various navigable waterways. Various types of dredging vessels are employed by Bean in the course of its work. Bean's services are most often required during low water level periods. (Tr. p. 29) During high water level periods it is often necessary to dock the dredging vessels. Complaint, ¶ 4 and Answer, ¶ 4 (R. pp. 3 and 20). However, the vessels have never been dry-docked or "mothballed" in Tennessee. (Tr. pp. 45-46)

The United States Army Corps of Engineers engaged Appellee's dredge, the vessel *Lenel Bean*, during the years

1980, 1981 and 1982 to perform dredging operations wherever needed on the Mississippi River between river mile 599 and river mile 800. Stipulation, ¶ 6. Mile marker 599 (located south of the Tennessee state line at the mouth of the White River in Arkansas) marks the southern boundary of the Memphis District of the Corps of Engineers, and mile marker 800 (located in the vicinity of Kate Aubrey, which is just upstream from Osceola, Arkansas) marks the northern boundary of Appellee's services to the Corps of Engineers. (Deposition of Charles K. Davis, pp. 20-21) In order to carry out its contractual obligations, therefore, it was necessary for Bean to move back and forth across several state lines.

In addition, while Bean was engaged in dredging operations, two to three shore stations were set up on either bank of the Mississippi River. At these shore stations on each side of the river, a "Motorola mini-ranger positioning system," which is a radio guidance system, constantly sent signals to the dredge and the computer aboard the dredge to maintain proper position in the river during operations. (Tr. pp. 32-34) Since these stations were necessarily in separate states on most occasions, Bean was constantly engaged in interstate radio transmission during the course of its dredging activities and as a necessary part thereof. (Tr. pp. 32-34)

The following pertinent facts concerning Bean's contracts with the Corps of Engineers are established by the Stipulation of Facts, which incorporates the actual contract documents as Exhibits "E," "F" and "G." Because those contracts are lengthy, however, references to additional portions of the record which support the factual statements have been included where appropriate.

Bean's contracts with the Corps of Engineers require it to furnish the vessel *Lenel Bean* and its attendant plant to perform dredging operations for the Corps of Engineers on the Mississippi River between mile 599 and mile 800. Specific locations are assigned by the Corps of Engineers from time to time (Davis Depo. p. 7), and the contract requires Bean to be available at any assigned location within five days of notice from the Corps of Engineers. (Tr. pp. 42, 44) The contract provides that the Corps of Engineers shall designate the precise area of the river to be dredged, as well as the precise disposal area, and the Corps of Engineers performs surveys to determine the quantity of material transported. (Tr. pp. 29, 30; Stipulation, Exs. "E," "F" and "G") The contracts require Bean to furnish the Corps of Engineers' inspector transportation from all points on shore designated by the Corps of Engineers to and from Bean's vessel and requires Bean to transport on board the *Lenel Bean* Corps of Engineers personnel and equipment and to furnish meals and accommodations to such Corps of Engineers personnel. (Tr. pp. 30 and 31; pp. 50 and 51) Accordingly, in addition to transporting silt and shoal material, Appellee's vessel also transports Corps of Engineers personnel and equipment. (*Id.*) Under the terms of the contract, the quantity of material to be transported cannot be given in advance, but is determined by the shoaling which may occur over an extended time. (See e.g., Stipulation, Ex. "E," p. 2A-1) The order of work to be done cannot be determined except as the work progresses. (See e.g., Stipulation, Ex. "E," p. 2A-1) Succeeding dredging location assignments may be upstream or downstream and may not be at consecutive locations. (See e.g., Stipulation, Ex. "E," p. 2A-2) Upon

completion of work at any given location, Appellee must immediately proceed to and initiate dredging at the next assigned location. Upon receipt of notice of a new assignment, Appellee must remobilize at the assigned location within five days after receipt of the notice. (*Id.*, See also Tr. pp. 42, 44 and Davis Depo., p. 25)

The Corps of Engineers contracts further provide that the material excavated shall be transported and deposited in the disposal areas designated by the Corps of Engineers. (See e.g., Stipulation, Ex. "A," p. 2A-3) The Corps of Engineers requires Bean to keep on the job the dredge, including all necessaryy attendant plant, needed to meet the requirements of maintaining authorized navigation channels. (*Id.* at 2A-1)

Dredging services are required most often during low water level periods and due to the seasonal nature of the Mississippi River water stages (Davis Depo., p. 18), it is often necessary for the *Lenel Bean* to be anchored during the high water season. In order to retain the ability to respond to any needed point on the Mississippi River between mile 389 and mile 800 within five days, the *Lenel Bean* customarily anchored at McKellar Lake, a navigable harbor on the Mississippi River system. (Tr. p. 42) While in harbor, necessary servicing was performed to maintain the *Lenel Bean* in a state of readiness. (Tr. pp. 40, 43-44) Necessary lights were maintained, necessary crew and watchman were on board, lines and safety checks were tested, engines and equipment were maintained in a state of readiness, vessel documents and licenses were maintained, and the *Lenel Bean* was available to respond as needed in compliance with the Corps of Engineers' re-

quirements. (Stipulation, Ex. "H," Daily Production Reports) While at anchor at McKellar Lake the *Lenel Bean's* generator runs at all times. (Tr. p. 44)

In view of the Commissioner's argument that the vessel was in "storage" when anchoring at McKellar Lake, Bean contends that it is important to contrast the state of readiness maintained by the *Lenel Bean* during periods of high water with a vessel being placed in dry dock, shut down, decommissioned, mothballed, stored or otherwise taken out of a condition of operational readiness.

The vessel *Lenel Bean* is a self-propelled, dustpan dredge. (Davis Depo., p. 8) The *Lenel Bean* has all necessary propulsion, steerage, navigational and safety equipment for independent navigation. (Tr. pp. 14-15) Pumps on the *Lenel Bean* create a suction, and a pan on the front of the vessel sucks material up through the pan into a pipeline, through which material is transported out to the spoil or discharge area. (Davis Depo., p. 8) The *Lenel Bean* has 1,385 tons displacement, and is registered with the Coast Guard. (Tr. p. 14)

As an integral part of the *Lenel Bean's* dredging function, the *Lenel Bean's* attendant plant handles anchors, barges and pipeline for the *Lenel Bean*, carries supplies and personnel, runs hydrographic surveys to locate and monitor shoal before, during and after the dredging process, supports the pipline and transports silt material to the discharge area. (Stipulation, ¶ 8 and Tr. pp. 14-19) The attendant plant is essential for the *Lenel Bean* to function. (Tr. pp. 18-19)

The Chancellor found, as a matter of fact, that Bean is engaged in interstate commerce and that its entire

activity was for the furtherance and preservatioon of the navigation of the entire waterways. (Ruling of the Court, p. 2) The State concedes, as it must, that the Mississippi River is clearly an artery of interstate commerce and that Bean's dredging contributes to the navigability of the river. (Appellant's Brief, p. 9) The activities of the *Lenel Bean* in waters adjacent to the State of Tennessee were confined solely to the dredging operations in the Mississippi River conducted pursuant to contract with the U.S. Army Corps of Engineers, which required the *Lenel Bean* to be available to work at any point on the Mississippi River between river mile 599 and river mile 800. (Davis Depo., p. 14; Tr. p. 46 and Stipulation, Ex. "E," "F," "G" and "H") These dredging activities were for maintenance of the Mississippi River shipping channel. No construction activities, such as excavating a new harbor or canal, were engaged in by the *Lenel Bean* in the State of Tennessee. (Tr. pp. 41-42) As a dustpan dredge, the *Lenel Bean* is specifically designed for channel maintenance, as opposed to a cutter head dredge which is stationary and may be used on excavation projects. (Tr. p. 22) In addition to the activities pursuant to the Corps of Engineers contract in the waters adjacent to the States of Mississippi, Arkansas and Tennessee, the *Lenel Bean* did maintenance work in Louisiana and Alabama during 1980-82. (Tr. p. 41) During the actual dredging process it was not unusual for the dredging area to be in one state while the discharge area was in another. (Tr. p. 39)

ARGUMENT

I. A VESSEL OF 50 TONS DISPLACEMENT IS EXEMPT FROM TENNESSEE SALES AND USE TAX EVEN THOUGH SUCH VESSEL HAS COME TO REST WITHIN THE TERRITORY OF TENNESSEE AND HAS BECOME A PART OF THE MASS OF PROPERTY USED HERE.

A. *The Activities of the Vessel Are Exempt From Use Taxation Pursuant to Tenn. Code Ann. § 67-6-321.*

The 1973 Tennessee General Assembly enacted a specific exemption from the sales and use tax for vessels or barges of 50 tons or over of displacement used in interstate commerce. (Tenn. Code Ann. § 67-6-321, formerly codified as Tenn. Code Ann § 67-3012) In view of the proof at trial, the Commissioner has not taken the position that the *Lenel Bean* and its attendant plant are not encompassed within the term "vessel" as used in the statute, but instead asserts the State's right to impose a use tax against the *Lenel Bean* based upon the erroneous argument that the vessel is not used in interstate commerce, or that the anchoring of the *Lenel Bean* in a Mississippi River harbor adjacent to Tennessee during periods of high water removed the *Lenel Bean* from the statutory exemption. The Commissioner's rationale is not supported by reason or by the law. It is certainly not supported by the Chancellor's factual finding, and that finding comes to this Court accompanied by a presumption of correctness. T.R.C.P. 13(d)

B. *T. L. Herbert & Sons, Inc. v. Woods Supports The Application of the Exemption in this Case.*

The only Tennessee decision to interpret this statutory exemption is this Court's decision in the case of *T. L. Her-*

bert & Sons, Inc. v. Woods, 539 S.W.2d 28 (Tenn. 1976). *Herbert* concerned a towboat that was purchased in Louisiana and brought to Tennessee to be used in the Nashville harbor. In reviewing the facts of that case, this Court specifically noted that:

> The motor vessel Martha Ann itself seldom ventures outside the territorial waters of the State of Tenessee. . . . The vessel was brought to Tennessee shortly after its purchase, and has been used in and around the Nashville harbor almost exclusively since that time. There is no question but that it has 'come to rest' within the territory of Tennessee, and has become a part of the 'mass of property' used here.
>
> 539 S.W.2d at 29.

In *Herbert* this Court found that although the state had the constitutional power to tax the vessel, the vessel was nevertheless within the statutory exemption from taxation. Consequently, it is clear that a vessel can come to rest, and become a part of the mass of the property of Tennessee so as to be subject to the *power* of state taxation, and yet at the same time the same vessel can be in use in interstate commerce within the meaning of the statutory exemption. Thus, even assuming the Commissioner has the *power* to tax the *Lenel Bean*, the legislature specifically exempted vessels such as the *Lenel Bean* from the tax.

Appellee contends that in *Herbert*, the only reported case construing the statutory exemption, this Court has adopted a reading of the statute far broader than the Commissioner's narrow construction.

II. THE TENNESSEE LEGISLATURE HAS ELECTED TO EXEMPT FROM TAXATION VARIOUS "STORAGE" ACTIVITIES, EVEN THOUGH THE U.S. CONSTITUTION WOULD NOT PROHIBIT A TENNESSEE SALES OR USE TAX ON SUCH "STORAGE."

A. *Even if the Temporary Docking of the Vessel is Held to Constitute Storage, It is Not Subject to Imposition of the Use Tax.*

The Commissioner argues that the anchoring of the *Lenel Bean* from time to time at McKellar Lake constitutes "storage" which is subject to the use tax. Reason tells us that no vessel is in perpetual motion. The vessel in *Herbert* was obviously stopped on frequent occasions to dock, to anchor, to tie up, and while awaiting assignment. Applying the Commissioner's rationale, the intsant any vessel docked or tied up, such vessel would be considered to be in "storage" and subject to the use tax. However, the Commissioner again very narrowly applies the word "storage" to subject a vessel to use tax. Actually, wherever the term "storage" appears in the Tennessee statute, it is only part of the more precise and limited phrase "storage for use or consumption in this state." See Tenn. Code Ann. §§ 67-6-102(16); 67-6-201; 67-6-203; 67-6-210; 67-6-211.

This Court has repeatedly recognized that the Tennessee legislature has exempted from the use tax property which a taxpayer has in "storage" in Tennessee. Included in the Tennessee cases considering "storage" are the cases of *Young Sales Corp. v. Benson*, 224 Tenn. 88, 450 S.W.2d 574 (1970), and *Beecham Laboratories v. Woods*, 569 S.W.2d 456 (Tenn. 1978). Both of these cases were

decided adversely to the Commissioner, holding that even though storage is encompassed within the definition of "use," the Tennessee legislature has exempted items which are stored in Tennessee for use outside the state. In addition, the incident of taxation, even as to such stored items ultimately used in Tennessee, does not occur until the item is withdrawn from storage and used in Tennessee.

As applied to Bean, even if anchoring the vessel in a harbor constitutes "storage," it does not subject the vessel to Tennessee use tax since the storage was not "storage for use or consumption in the State." The operations of the *Lenel Bean* have been confined strictly to interstate activities, there have been no intrastate or local dredging activities, and the anchoring was in preparation for use in interstate commerce as directed by the Corps of Engineers.

B. *Tennessee Cases Dealing With Taxation of Repairs Performed in Tennessee Do Not Support the Imposition of a Tax in the Instant Case.*

It is noteworthy that even in the service and repair cases cited by Appellant in which Tennessee taxation has been sustained, *only the repairs themselves* were taxed. The underlying property undergoing repair [barges in *Serodino, Inc. v. Woods,* 568 S.W.2d 610 (Tenn. 1978), and motors in *LeTourneau Sales & Service, Inc. v. Olsen,* 691 S.W.2d 531 (Tenn. 1985)] was not subjected to tax. The barges and motors were much more out of service and placed in "storage" in Tennessee than is the *Lenel Bean,* yet no suggestion is made that the *Serodino* barges or *LeTourneau* motors are to be taxed. Only the *repairs* are taxed.

The clear legislative intent to exempt vessels and barges from Tennessee sales and use tax is further indicated by the adoption of the exemption of repair services on vessels and barges [Tenn. Code Ann. § 67-6-327; formerly § 67-3012(8)(b)] almost immediately following the decision in *Serodino*. (1982 [Adj. S.] ch. 576)

III. THE TERM "INTERSTATE COMMERCE" IS A BROAD TERM, EMBRACING EACH OF THE ACTIVITIES OF THE VESSEL IN THIS CASE.

A. *The Activities of the Vessel Fall Within the Court's Definition of Interstate Commerce as Articulated in T. L. Herbert & Sons v. Woods.*

The Tennessee Retailers' Sales Tax Act contains no statutory definition of the term "interstate commerce." Accordingly, in *Herbert*, this Court applied the "generally accepted and defined" meaning of the term "interstate commerce," determining that if the vessel is not engaged in moving *intrastate or local* cargos, although the vessel itself seldom leaves the territorial borders of the state, the vessel is nevertheless in interstate commerce as that term is generally accepted and defined. 539 S.W.2d at 30.

The extraterritorial activities of the *Lenel Bean* are far greater than the out-of-state activities of the *Herbert* vessel. The *Lenel Bean* frequently leaves the waters of the State of Tennessee, traveling through waters of Arkansas, Mississippi and Louisiana, whereas the *Herbert* vessel seldom left the waters of the State of Tennessee. The *Lenel Bean* is in the Mississippi River, bordering the State of Tennessee, whereas the *Herbert* vessel was on the Cumberland River, surrounded by the State of Tennessee. The owner of the *Lenel Bean* is a Louisiana corporation, headquartered in Louisiana, whereas the owner of the *Herbert*

vessel was a Tennessee corporation, headquartered in Tennes e. The *Lenel Bean* is anchored in waters bordering the State of Tennessee only during periods of high water and in order to be in a state of readiness to respond to points on the Mississippi River as directed by the Corps of Engineers. The *Herbert* vessel was actually a harbor boat operating almost exclusively in the Nashville harbor. 539 S.W.2d at 29.

In *Herbert,* this Court made approving reference to the exemption for vehicles used for "movement in interstate commerce," as applied in *United Parcel Service. Inc. v. Arnold,* 211 Kan. 102, 542 P.2d 694 (1975). 539 S.W.2d at 31, n. 2. In *United Parcel Service,* the Supreme Court of Kansas recognized that a carrier, although operating a line wholly within a state, is nevertheless engaged in interstate commerce when the carrier is itself transporting other property or persons which have crossed or will cross state boundaries. The *United Parcel Service* case involved vans and tractor trailers which were used solely within the State of Kansas to transport parcels traveling in interstate commerce. When brought into the State of Kansas, the transportation units were ready for immediate use in the same form, and were not held back from the normal course of operations. Similarly, even though temporarily at anchor during high water, the *Lenel Bean* was ready for immediate use in the same form and was not held back from the normal course of operations. Clearly, the normal course of operation of a dredge used in maintaining a navigational channel is that the dredge is actually dredging only when the water is shallow, not during flood stage. It is entirely "normal operation" for a dredge to be anchored during high water, but remaining

in a state of readiness to respond when needed. In view of the facts of this particular case, where the *Lenel Bean* is required by contract to remain in a state of readiness in order to respond to orders of the Corps of Engineers within five days, and in view of the fact that the sole function of the vessel is to dredge during low water periods, which are determined by the weather and are not within Beans' control, "normal operation" requires standing by in a central location such as McKellar Lake.

B. *Case Law From Other States and in the Federal Courts Supports a Finding that Dredging on an Interstate Waterway Constitutes Interstate Commerce.*

Case law supports the Chancellor's factual finding that Bean was engaged in interstate commerce in this case. Appellant incorrectly asserts in its Brief that all jurisdictions considering the issue have found dredging not to constitute interstate commerce. (Appellant's Brief, p. 13) In fact, numerous cases have specifically held that dredging, dike revetment and similar activities on navigable rivers constitute engaging in interstate commerce. The case of *Walling v. Patton-Tulley Transportation Co.*, 134 F.2d 945 (6th Cir. 1943), involved employees engaged on dike and revetment construction on the Mississippi River under contracts of their employer with the United States. The court there noted that "the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory . . . . We have no difficulty in concluding that the dike and revetment employees of the appellee were engaged in interstate commerce . . . . " 134 F.2d at 947. Cases specifically holding dredging to be included in interstate commerce in-

clude *Ritch v. Puget Sound Bridge and Dredging Co., Inc.*, 156 F.2d 334 (9th Cir. 1946); *Walling v. Sternberg Dredging Co.*, 64 F. Supp. 758 (E.D. Mo. 1946), *aff'd* 158 F.2d 678 (8th Cir. 1946); and *Cuascut v. Standard Dredging Corp.*, 94 F. Supp. 197 (D.P.R. 1950).

In the recent case of *Port of Portland v. Water Quality Insurance Syndicate*, 796 F.2d 1188 (9th Cir. 1986), the Court of Appeals for the Ninth Circuit was called upon to determine whether a dredge, which sank while being prepared for another dredging season on the Columbia and Williamette Rivers under a contract with the Corps of Engineers, was "engaged in commerce" so as to fall within the coverage of its insurance policy. The Court held that dredging activities did constitute commerce, citing with approval the case of *Ritch v. Puget Sound Bridge & Dredging Co., supra.* The Ninth Circiut held that the dredge was engaged in commerce even though the dredge was merely preparing for its dredging activities. In so doing, the Court noted that the concept of interstate commerce has been extended by the recent United States Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 1016-21, 83 L. Ed. 2d 1016 (1985) which overruled *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) and held that the commerce clause extends to all intrastate economic activities affecting interstate commerce. Bean respectfully submits that the analysis in *Port of Portland* is in keeping with the modern concept of interstate commerce.

Several decisions have further held that repairmen and watchmen of vessels temporarily removed from service are engaged in interstate commerce. Repairmen and

watchmen on vessels temporarily removed from service while being repaired continue to be engaged in interstate commerce, since the vessels retain their status as instrumentalities of interstate commerce during such times of being temporarily out of service. *Craig v. Heide & Co.*, 94 F. Supp. 442 (E.D.N.C. 1951); *Slover v. Walthen*, 140 F.2d 258 (4th Cir. 1944); *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405 (3d Cir. 1947); and *Divins v. Hazeltine Electronics Corp.*, 163 F.2d 100 (2d Cir. 1947). Since the *Lenel Bean* remained an instrumentality of interstate commerce while anchoring during high water and since its crew continued to be engaged in interstate commerce, the *Lenel Bean* itself remained exempt from the sales and use tax.

As noted above, Appellant erroneously states that all jurisdictions which have addressed the question of whether dredging constitutes an activity in interstate commerce have ruled in favor of the state tax liabilities. Actually, the Commissioner cites only one case addressing the issue in light of an exemption similar to Tennessee's exemption statute, Tenn. Code Ann. § 67-6-321. That one case was the New York case of *Great Lakes Dredge & Dock Co. v. Dep't of Taxation*, 39 N.Y.2d 75, 346 N.E.2d 796 (1976).

The decision in the New York case, however, involved an exemption statute which covered only vessels "*primarily* engaged in interstate or foreign commerce." 346 N.E.2d at 797 (emphasis supplied). More importantly, the decision was reached on the basis of a specific finding as follows:

> It was specifically found that the dredges, drill boats and cranes did not move across state lines while engaged in their usual work tasks.
>
> 346 N.E.2d at 797.

There, the dredge itself was exclusively in one state, the State of New York. The dredge itself never crossed state lines while engaged in its usual work tasks, and only separate scows were used to haul disposal materials across state lines to dump the loads. The type of dredging process utilized in the New York dredging activity is substantially different from the dredging activity of Bean on the Mississippi River on the border between Tennessee and Arkansas. The facts show that the *Lenel Bean* did, in fact, move across state lines while engaged in its usual work tasks. On occasion, the dredge worked *simultaneously* in Tennessee and Arkansas or Mississippi waters with its dustpan head in one state and its discharge in another. Unlike the facts of the instant case, the dredges in the New York case were fixed in one place by a special anchor.

The cases cited by the Commissioner in its Brief to support its proposition that the dredging activities in the instant case do not constitute interstate commerce are distinguishable. In addition to the factual dissimilarities between Bean and the cases cited, it must be noted that the courts approach the question of interstate commerce in a different manner when dealing with the issue of whether a state has the *power* to tax without an unconstitutional infringement on interstate commerce, as opposed to when they approach an exemption statute which exempts instrumentalities used in interstate commerce from a particular state tax. This Court implicitly recognized that distinction in the *Herbert* case in overruling the trial court's finding in favor of the State, while at the same time observing:

> The trial judge concluded that the vessel was not being "used in interstate commerce", so as to fall within the purview of the exemption. His findings, however were based largely upon the discussion of constitutional issues, and upon the taxpayer's contention that the state could not constitutionally levy a tax upon a vessel used as described above. As previously stated, the trial court was clearly correct in holding that the taxing power of the state does attach to such use, and that the state may validly tax some aspects of "interstate commerce."
>
> 539 S.W.2d at 29.

Similarly, the cases cited by the Commissioner in support of its proposition are cases examining the question of whether particular states have the power to constitutionally tax dredging activities without running afoul of the Commerce Clause of the Constitution. This is an issue which Bean has conceded. Bean does not contend that the State of Tennessee has no power to tax the activities involved in this case, but does contend that the activities have been exempted by statute.

The Maryland Court of Appeals in *Atlantic, Gulf and Pacific Co. v. State Dep't of Assessments and Taxation*, 249 A.2d 180 (M.D. 1969), specifically considered the issue of whether a dredge was engaged in interstate commerce in a case involving the application of Maryland taxing statutes. Citing numerous federal decisions, the Maryland court held that there is little doubt that the dredge was engaged in interstate commerce.

> In the federal decisions, there is little doubt that the *Pittsburgh* was engaged in interstate commerce.
>
> Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act . . . and

> we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category.
>
> 249 A.2d at 184.

The Maryland court relied upon the Supreme Court's enunciation in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S. Ct. 494, 87 L. Ed. 656 (1943), for the proposition that the improvement or repair of facilities of interstate commerce constitutes interstate commerce.

No state has taxed dredging activities in light of the combination of Tennessee's statutory exemption, the facts in Bean, and the ruling of this Court in *Herbert*.

The Commissioner's implication that Tennessee intends to tax everything it could possibly constitutionally tax is patently incorrect. For example, a sale, consummated in Tennessee, of a vessel *could* clearly be subjected to a sales tax in Tennessee without violating the United States Constitution, even though that vessel was intended to be placed in interstate commerce. However, Tenn. Code Ann. § 67-6-321 exempts that sale from the Tennesee sales tax. For the Commissioner to suggest that Tennessee intends to exempt a sale, but tax the use of the same vessel, is faulty and ignores the basic tenet of taxation that a use tax is a *compensating tax*, designed to prevent avoidance of sales taxes and insure that manufacturers and merchants in the state remain on equal competitive footing with nonresidents. If the sale to a Tennessee resident is not to be taxed, the use by a nonresident is likewise not to be taxed.

CONCLUSION

In view of the foregoing points and authorities and in light of the record in the trial court and the findings of the Chancellor, Appellee Bean Dredging Corporation respectfully asserts that the Chancellor correctly determined the issues in this case and the Chancellor's decision should be affirmed.

Respectfully submitted,

/s/ Boyd L. Rhodes, Jr. (by RMG) (7966)

/s/ R. Mark Glover (6807)
Attorneys for Plaintiff/
Appellee Bean Dredging
Corporation

HEISKELL, DONELSON, BEARMAN
ADAMS, WILLIAMS & KIRSCH
6750 Poplar, Suite 308
Memphis, Tennessee 38138
(901) 755-6713

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a true and exact copy of the foregoing instrument by U.S. Mail, postage prepaid, to counsel for the Commissioner of Revenue of the State of Tennessee, the Honorable Charles L. Lewis, Deputy Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, 37219, this 20th day of November, 1986.

RMG15/C3521-01 /s/ R. Mark Glover

APPENDIX I

IN THE CHANCERY COURT FOR
SHELBY COUNTY, TENNESSEE

BEAN DREGING CORPORATION,	)	
	)	NO. 90712-3
PETITIONER,	)	
v.	)	
MARTHA B. OLSEN, and her successors, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	)	
RESPONDENT.	)	

FINAL DECREE

This cause came on to be heard before the Honorable D. J. Alissandratos, Chancellor of Part III of the Chancery Court of Shelby County, Tennessee, in open Court, upon the sworn testimony of Capt. Charles K. Davis, upon the sworn testimony of Virginia Adams, Director of Statistics, Department of Revenue; upon the stipulations of fact filed in this cause and made in open Court, upon the respective briefs of the parties herein, and upon statements and arguments of counsel in open Court, and upon the entire record in this cause.

From all of which it appears and the Court finds for the reasons stated in its Memorandum Opinion orally rendered from the bench, a transcript of which is attached hereto and incorporated herein by reference, that Petitioner is entitled to a refund of the taxes, penalty and in-

terest paid under protest in the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars ($571,552.43), plus interest thereon at the rate of ten percent (10%) per annum from August 18, 1983, the date of Petitioner's payment under protest.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Petitioner be and hereby is awarded a judgment in the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars ($571,552.43), plus interest thereon at the rate of ten percent (10%) per annum from August 18, 1983, until paid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the costs of this cause be and the same hereby are assessed against the Respondent, State of Tennessee, Department of Revenue.

/s/ D. J. Alissandratos
D. J. Alissandratos, Chancellor
5-21-86

DATE: ————

APPROVED FOR ENTRY:
/s/ Boyd L. Rhodes, Jr.
BOYD L. RHODES, JR.
Attorney for Petitioner

/s/ Charles L. Lewis
CHARLES L. LEWIS
Deputy Attorney General
Attorney for Respondent

/s/ James Baywell
Deputy Clerk

———

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY
DIVISION AT MEMPHIS

BEAN DREDGING,	)	
Plaintiff,	)	
Vs.	)	Case Number: 90712-3
MARTHA OLSEN, COMMISSIONER OF REVENUE,	)	
Defendant.	)	

BEFORE: Judge D. J. Alissandratos

THE RULING OF THE COURT

May 6, 1986

* * *

THE COURT: I want to compliment the lawyers on very thoroughly briefing this matter and preparing for this hearing. I appreciate not only the thoughtfulness as reflected by those briefs but also the thoughtfulness of your remarks both in closing argument and also in responding to the questions of the Court.

This Court is of the opinion that while it is helpful to have the thoughtful analysis of sister states in their opinions from their courts that this Court must look first to the law as set out by the courts of Tennessee. This Court, therefore, relies heavily upon the Herbert and Sons versus Woods case that has been cited by both parties.

In reviewing the facts of this case and the facts of that case I find that the plaintiffs in this cause were engaged in interstate commerce. I find that the entire scope of their activity was for the furtherance of preserving the navigation of the entire waterways, and I see no distinction between that and one who would avail themselves of those waterways simply for the purpose of transporting either goods or services across them.

With regard to the argument propounded by the Commissioner as relates to storage, this Court does not believe that the statute contemplates the facts as in this case. Again relying on the Herbert case I would point out that indeed in this case the only reason I find that this vessel was not actually docked in Tennessee is because there was no dock suitable enough for it to be docked. It created a man-made dock. For all practical purposes, it was docked. But it was not here in a capacity of storage as within the meaning of the statute I do not believe. It was here temporarily. And while that temporary time may have at times seemed somewhat frequent it was only as a result of the condition of the river the vast majority of the time that caused it to remain in its man-made dock. I see that as no different than the Herbert case.

The primary mission of the plaintiffs in this case and purpose was to conduct interstate activity and it's contacts with Tennessee were only for the purpose of furtherance of the activity. Therefore, I will grant judgment in favor of the plaintiffs, cost to be assessed against the defendants.

COURT REPORTER'S CERTIFICATE

STATE OF TENNESSEE:

COUNTY OF SHELBY:

I, LISA M. MCMANNIS, Reporter and Notary Public, Shelby County, Tennessee, CERTIFY:

1. The foregoing hearing was taken before me at the time and place stated in the foregoing styled cause;

2. Being a Court Reporter, I then reported the hearing in Stenotype to the best of my skill and ability, and the foregoing pages contain a full, true and correct transcript of my said Stenotype notes then and there taken;

3. I am not in the employ of and am not related to any of the parties or their counsel, and I have no interest in the matter involved.

WITNESS MY SIGNATURE, this, the 6th of May, 1986.

/s/ Lisa M. McMannis
LISA M. MCMANNIS,
Court Reporter
Notary Public for the State
of Tennessee at Large

My commission expires:
March 18, 1989

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

BEAN DREDGING CORPORATION,	)	
Plaintiff,	)	NO. 90712-3
V.	)	
MARTHA B. OLSEN, Commissioner of Revenue,	)	
Defendant.	)	

PLAINTIFF'S REPLY BRIEF

TO THE HON. D. J. ALISSANDRATOS, CHANCELLOR OF PART THREE OF THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE:

Plaintiff Bean Dredging Corporation respectfully submits this Reply to Defendant's Trial Brief.

DREDGING ACTIVITIES ON NAVIGABLE WATERWAYS CONSTITUTE ACTIVITIES IN INTERSTATE COMMERCE.

The Commissioner erroneously states that all jurisdictions which have addressed the question of whether dredging constitutes an activity in interstate commerce have ruled in favor of the state tax liabilities. Actually, the Commissioner cites only one case addressing the issue in light of an exemption similar to Tennessee's exemption statute, § 67-6-321. That one case was the New York case of *Great Lakes Dredge Co. v. Dep't of Taxation,* cited on page 7 of the Commissioner's Brief.

However, the decision in the New York case was reached on the basis of a specific finding as follows:

> It was specifically found that the dredges, drill boats and cranes did not move across state lines while engaged in their usual work tasks.
>
> 346 N.E.2d at 797.

There, the dredge itself was exclusively in one state, the State of New York, the dredge itself never crossed state lines while engaged in its usual work tasks, and only separate scows were used to haul disposal materials across state lines to dump the loads. The type dredging process utilized in the New York dredging activity is substantially different from the dredging activity of Bean on the Mississippi River on the border between Tennessee and Arkansas. The facts show that the Lenel Bean did, in fact, move across statelines while engaged in its usual work tasks. On occasion, the dredge worked *simultaneously* in Tennessee and Arkansas or Mississippi waters with its dustpan head in one state and its discharge in another.

In addition, the Maryland court in *Atlantic, Gulf and Pacific Co. v. State Dep't of Assessments and Taxation*, 249 A.2d 180 (M.D. 1969), specifically considered the issues of whether a dredge was engaged in interstate commerce. Citing numerous federal decisions, the Maryland court held that there is little doubt that the dredge was engaged in interstate commerce.

> In the federal decisions, there is little doubt that the *Pittsburgh* was engaged in interstate commerce.
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> Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act . . . and we think the work of improving existing facilities of

> interstate commerce, involved in the present case, falls in the same category.
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> 249 A.2d at 184.

The Maryland court relied upon the Supreme Court's enunciation in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943), for the proposition that the improvement or repair of facilities of interstate commerce constitutes interstate commerce.

No state has taxed dredging activities in light of the combination of Tennessee's statutory exemption, the facts in Bean, and the ruling of the Tennessee Supreme Court in *Herbert* to the effect that a vessel which had come to rest in Tennessee and become a part of the mass of property of Tennessee nevertheless remained in interstate commerce within Tennessee's statutory exemption.

TENNESSEE'S STATUTE SPECIFICALLY EXEMPTS NUMEROUS ACTIVITIES WHICH COULD BE SUBJECTED TO TAX WITHOUT VIOLATING THE U. S. CONSTITUTION.

The Commissioner's implication that Tennessee intends to tax everything it could possibly constitutionally tax is patently incorrect. For example, a sale, consummated in Tennessee, of a vessel *could* clearly be subjected to a sales tax in Tennessee without violating the U.S. Constitution, even though that vessel was intended to be placed in interstate commerce. However, T.C.A. § 67-6-321 exempts that sale from Tennessee tax. For the Commissioner to suggest that Tennessee intends to exempt a sale, but tax a use of the same vessel, is faulty and ignores the basic tenet of taxation that a use tax is a *compensating tax*.

designed to prevent avoidance of sales taxes and insure that manufacturers and merchants in the state remain on equal competitive footing with nonresidents. If the sale to a Tennessee resident is not to be taxed, the use by a nonresident is likewise not to be taxed.

THE TENNESSEE LEGISLATURE HAS ELECTED TO EXEMPT FROM TAXATION VARIOUS "STORAGE" ACTIVITIES, EVEN THOUGH THE U.S. CONSTITUTION WOULD NOT PROHIBIT A TENNESSEE SALES OR USE TAX ON SUCH "STORAGE."

nized that the Tennessee legislature has exempt from the use tax property which a taxpayer has in "storage" in Tennessee. Included in the Tennessee cases considering "storage" are the cases of *Young Sales Corp. v. Benson*, 224 Tenn. 88, 450 S.W.2d 574 (1970), and *Beecham Laboratories v. Woods*, 569 S.W.2d 456 (Tenn. 1978). Both of these cases were decided adversely to the Commissioner, holding that even though storage is encompassed within the definition of "use," the Tennessee legislature has exempted items which are stored in Tennessee for use outside the state. In addition, the incident of taxation, even as to such stored items ultimately used in Tennessee, does not occur until the item is withdrawn from storage and used in Tennessee.

As applied to Bean, even if anchoring the vessel in harbor constitutes "storage," such storage was not for use or consumption in Tennessee. The anchoring was for use in interstate commerce as directed by the Corps of Engineers.

The Tennessee Supreme Court has repeatedly recog-

It is noteworthy that even in the service and repair cases in which Tennessee taxation has been sustained, *only the repairs themselves* were taxed. The underlying property undergoing repair (barges in *Serodino* and motors in *LeTourneau*) was not subjected to tax. The barges and motors were much more out of service and placed in "storage" in Tennessee than is the *Lenel Bean*, yet no suggestion is made that the *Serodino* barges or *LeTourneau* motors are to be taxed. Only the *repairs* are taxed.

The clear legislative intent to exempt vessels and barges from Tennessee sales and use tax is further indicated by the adoption of the exemption of repair services on vessels and barges (T.C.A. § 67-6-327) almost immediately following the court decision in *Serodino*.

SUMMARY

Tennessee cases are more pertinent to a Tennessee tax decision than are cases from other jurisdictions. The Tennessee Supreme Court in *Herbert, Beecham Laboratories and Young Sales* has repeatedly emphasized that the term "interstate commerce" exempts a range of activities which *could* be subjected to a constitutional tax, and that the exemption is not limited to the limits of a constitutional tax on use.

Respectfully submitted,

BOYD L. RHODES, JR. (7966)
Attorney for Plaintiff

OF COUNSEL:

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH
6750 Poplar Avenue, Suite 308
Memphis, Tennessee 38138
(901) 755-6713

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument has been served on opposing counsel by depositing a copy in the U.S. mail, postage prepaid, this —— day of May, 1986, and by personal delivery to opposing counsel.

.....

BLR7A/E8672-04

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

BEAN DREDGING CORPORATION,	)	
Plaintiff,	)	NO. 90712-3
V.	)	
MARTHA B. OLSEN, Commissioner of Revenue,	)	
Defendant.	)	

PLAINTIFF'S PRE-TRIAL BRIEF

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE:

Plaintiff Bean Bredging Corporation respectfully submits the following Pre-Trial Brief.

FACTS

Nature of the Case.

This is a suit for refund of Tennessee sales and use taxes paid by Bean Dredging Corporation ("Bean") to the Commissioner of Revenue of the State of Tennessee ("Commissioner"). The Commissioner also assessed penalty and interest, and Bean properly paid under protest the total assessment of tax, penalty and interest.

Jurisdictional and Procedural Requirements.

Jurisdiction and venue are properly in Chancery Court in Shelby County, Tennessee. Jurisdiction, venue

and statutory requirements of payment under protest within the period of limitations are admitted by the Commissioner and are not at issue.

Description of Bean.

Bean is a Louisiana corporation with its principal place of business in Metairie, Louisiana. Bean engages principally in dredging operations on various navigable waterways, transporting silt and shoal material from points within the navigable shipping channel to points outside the channel. The particular silt and shoal material transported by Bean's dredge may originate at any point on the watershed of the Mississippi River system and be carried downstream by the river to form a shoal or sandbar. For example, dirt from an Iowa farm may be washed into the Mississippi River system, commingled with dirt from farms in other states, carried downstream by the current, and deposited on a sandbar in the channel of the Mississippi River, from which it is then transported outside the channel by Bean's dredge.

Services to Corps of Engineers.

The U.S. Army Corps of Engineers engaged Bean's dredge, the vessel *Lenel Bean*, during the years 1980-82 to perform dredging operations wherever needed on the Mississippi River between river mile 599 and river mile 800. Mile marker 599 (located between Bolivar County, Mississippi and Desha County, Arkansas, approximately 10 miles upstream from Rosedale, Mississippi) marks the southern boundary of the Memphis District of the Corps of Engineers, and mile marker 800 (located between Lauderdale County, Tennessee and Mississippi County, Arkansas,

approximately 14 miles upstream from Osceola, Arkansas) marks the northern boundary of Bean's services to the Corps of Engineers.

Corps of Engineers Contract.

Bean's contract with the Corps of Engineers requires Bean to furnish the vessel *Lenel Bean* and its attendant plant to perform dredging operations for the Corps of Engineers on the Mississippi River between mile 599 and mile 800. Specific locations are assigned by the Corps of Engineers from time to time, and the contract requires Bean to be available at any assigned location within five days of notice from the Corps of Engineers. The contract provides that the Corps of Engineers shall designate the precise area of the river to be dredged, as well as the precise disposal area, and the Corps of Engineers performs surveys to determine the quantity of material transported. The contract requires Bean to furnish the Corps of Engineers' inspector transportation from all points on shore designated by the Corps of Engineers to and from Bean's vessel and requires Bean to transport on board the *Lenel Bean* Corps of Engineers personnel and equipment and to furnish the meals and accommodations to such Corps of Engineers personnel. Accordingly, in addition to transporting silt and shoal material, Bean's vessel also transports Corps of Engineers personnel and equipment. Under the terms of the contract, the quantity of material to be transported cannot be given in advance, but is determined by the shoaling which may occur over an extended time. The order of work to be done cannot be determined except as the work progresses. Succeeding dredging location assignments may be upstream or downstream and may

not be at consecutive locations. Upon completion of any given location, Bean must immediately proceed and initiate dredging at the next assigned location. Assignments of dredging locations will be dependent upon river stages and relative shoaling rates and channel conditions. These dredging locations will be determined and assigned by the Corps of Engineers. Upon receipt of notice of a new assignment, Bean must remobilize at the assigned location within five days after receipt of the notice.

The contract further provides that the material excavated shall be transported and deposited in the disposal areas designated by the Corps of Engineers. The Corps of Engineers requires Bean to keep on the job the dredge, including all necessary attendant plant, needed to meet the requirements of maintaining authorized navigation channels, and sufficient length of floating discharge pipeline is required to insure proper placement of dredged material. Dredging services are required most often during low water level periods and due to the seasonal nature of the Mississippi River water stages, it is often necessary for the *Lenel Bean* to be anchored during the high water season. In order to retain the ability to respond to any needed point on the Mississippi River between mile 599 and mile 800 within five days, the *Lenel Bean* customarily anchored adjacent to the Corps of Engineers facility at McKellar Lake, a navigable harbor on the Mississippi River system. While in harbor, necessary servicing was performed to maintain the *Lenel Bean* in a state of readiness. Necessary navigational lights were maintained, necessary crew and watchman were on board, lines and safety checks were tested, engines and equipment were maintained in a

state of readiness, vessel documents and licenses were maintained, and the *Lenel Bean* was available to respond as needed in compliance with the Corps of Engineers' requirements.

It is important to contrast the state of readiness maintained by the *Lenel Bean* during periods of high water with a vessel being placed in dry dock, shut down, decommissioned, mothballed, stored or otherwise taken out of a condition of operational readiness.

The Vessel Lenel Bean.

The vessel *Lenel Bean* is a self-propelled, dustpan dredge. The *Lenel Bean* has all necessary propulsion, steerage, navigational and safety equipment for independent navigation. Pumps on the *Lenel Bean* create a suction, similar to a vacuum cleaner, and a pan on the front of the vessel sucks material up through the pan into a pipeline, through which material is transported out to the spoil or discharge area. The *Lenel Bean* has 1,385 tons displacement, it is 245 feet long, 40 feet wide, and has Coast Guard Registration No. 297573.

As an integral part of the *Lenel Bean's* dredging function, the *Lenel Bean's* attendant plant includes: (a) the *Richelle*, a self-propelled hydraulic crane barge of 134 tons displacement, 58 feet long, 30 feet wide, and having Coast Guard Registration No. 612597 and operated for the handling of anchors and pipeline for the *Lenel Bean*; (b) the tender *Robyn*, a push boat of 33.25 tons displacement, 38 feet long, 16 feet wide, and having Coast Guard Registration No. 603063 which handles barges and pipeline for the *Lenel Bean* and carries supplies and personnel; (c) the

Recon IV, a survey vessel on which Louisiana sales taxes have previously been paid in the amount of $1,265.60 which runs hydrographic surveys to locate and monitor shoal before, during and after the dredging process; (d) Barges No. 1601-1620, which are a matched set of pontoon barges which support the pipeline and transport silt material to the discharge area; and (e) the three-drum hoist, a component of Derrick Barge No. 31, which consists of a cable hoist mechanism and serves as a backup to the *Richelle*.

Interstate Activities.

The activities of the *Lenel Bean* in waters adjacent to the State of Tennessee were confined solely to the dredging operations conducted pursuant to the contract with the U.S. Army Corps of Engineers, which required the *Lenel Bean* to be available to work at any point on the Mississippi River between river mile 599 and river mile 800. These dredging activities were for maintenance of the Mississippi River shipping channel. No construction activities, such as excavating a new harbor or canal, were engaged in by the *Lenel Bean* in the State of Tennessee. As a dustpan dredge, the *Lenel Bean* is specifically designed for channel maintenance, as opposed to a cutter head dredge which may be used on excavation projects. In addition to the activities pursuant to the Corps of Engineers contract in the waters adjacent to the States of Mississippi, Arkansas and Tennessee, the *Lenel Bean* did maintenance work on the Calcasieu River in Louisiana during 1980 and was involved with the Theodore Ship Channel project outside Mobile, Alabama during 1980-81. The *Lenel Bean* has never engaged in transporting intrastate or local Tennessee cargo.

ISSUE

IS THE *LENEL BEAN* A VESSEL OR BARGE OF 50 TONS OR OVER OF DISPLACEMENT PURCHASED FOR USE IN INTERSTATE COMMERCE OR BEING USED IN INTERSTATE COMMERCE, AND EXEMPT FROM SALES AND USE TAX AS PROVIDED IN T.C.A. § 67-6-321?

STATEMENT OF LAW

A VESSEL OF 50 TONS DISPLACEMENT IS EXEMPT FROM TENNESSEE SALES AND USE TAX EVEN THOUGH SUCH VESSEL HAS COME TO REST WITHIN THE TERRITORY OF TENNESSEE AND HAS BECOME A PART OF THE MASS OF PROPERTY USED HERE.

The 1973 Tennessee General Assembly enacted a specific exemption from the sales and use taxes for vessels or barges of 50 tons or over of displacement used in interstate commerce. (T.C.A. § 67-6-321, formerly codified as T.C.A. § 67-3012.) In view of the specific statutory exemption, the only rational basis for the Commissioner to assert a sales and use tax against the *Lenel Bean* is the erroneous position that anchoring the *Lenel Bean* in a Mississippi River harbor adjacent to Tennessee during periods of high water removed the *Lenel Bean* from the statutory exemption. The Commissioner's rationale is not supported by reason or by the law.

The only Tennessee decision to interpret this statutory exemption is *T. L. Herbert and Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976). *Herbert* concerned a tow-

boat that was purchased in Louisiana and brought to Tennessee to be used in the Nashville harbor. The court specifically noted that:

> The motor vessel Martha Ann itself seldom ventures outside the territorial waters of the State of Tennessee. . . . The vessel was brought to Tennessee shortly after its purchase, and has been used in and around the Nashville harbor almost exclusively since that time. There is no question but that it has 'come to rest' within the territory of Tennessee, and has become a part of the 'mass of property' used here.

In *Herbert* the Tennessee Supreme Court found that although the state had the *constitutional power* to tax the vessel, the vessel was nevertheless within the statutory exemption from taxation. Consequently, it is clear that a vessel can come to rest and become a part of the mass of the property of Tennessee so as to be subject to the *power* of state taxation, and yet at the same time the same vessel can be considered as being used in interstate commerce within the meaning of the statutory exemption. Thus, even assuming the Commissioner has the *power* to tax the *Lenel Bean*, the legislature specifically exempted vessels from the tax.

Herbert, the only reported case construing the statutory exemption, has adopted a reasoning far broader than the Commissioner's very narrow and unrealistic construction.

Reason tells us that no vessel is in perpetual motion. The vessel in *Herbert* was obviously stopped on frequent occasions to dock, to anchor, to tie up, and while awaiting assignment. Applying the Commissioner's rationale, the instant any vessel docked or tied up, such vessel would be considered to be in "storage" and subject to the use tax.

However, the Commissioner again very narrowly applies the word "storage" to subject a vessel to use tax. Actually, wherever the term "storage" appears in the Tennessee statute, it is only part of the more precise and limited phrase "storage for use or consumption in this state." See T.C.A. §§ 67-102(16); 67-6-201; 67-6-203; 67-6-210; 67-6-211. Accordingly, even if docking or anchoring a vessel during a period of high water constitutes "storage," such does not subject the vessel to Tennessee use tax since the storage is *not* "storage for use or consumption in Tennessee." The operations of the *Lenel Bean* have been confined strictly to interstate activities, and there have been no intrastate or local dredging activities.

THE TERM "INTERSTATE COMMERCE" IS A BROAD TERM, EMBRACING EACH OF THE ACTIVITIES OF THE *LENEL BEAN*.

The Tennessee Retailers' Sales Tax Act contains no statutory definition of the term "interstate commerce." Accordingly, in *Herbert*, the Tennessee Supreme Court applied the "generally accepted and defined" meaning of the term "interstate commerce," determining that if the vessel is not engaged in moving *intrastate or local* cargos, although the vessel itself seldom leaves the territorial borders of the state, the vessel is nevertheless in interstate commerce as that term is generally accepted and defined.

The extraterritorial activities of the *Lenel Bean* are far greater than the out-of-state activities of the *Herbert* vessel. The *Lenel Bean* frequently leaves the waters of the State of Tennessee, traveling through waters of Arkansas, Mississippi and Louisiana, where as the *Herbert*

vessel seldom left the waters of the State of Tennessee. The *Lenel Bean* is in the Mississippi River, bordering the State of Tennessee, whereas the *Herbert* vessel was on the Cumberland River, surrounded by the State of Tennessee. The owner of the *Lenel Bean* is a Louisiana corporation, headquartered in Louisiana, whereas the owner of the *Herbert* vessel was a Tennessee corporation, headquartered in Tennessee. The *Lenel Bean* is anchored in waters bordering the State of Tennessee only during periods of high water and in order to be in a state of readiness to respond to points on the Mississippi River as directed by the Corps of Engineers. The *Herbert* vessel was actually a harbor boat operating almost exclusively in the Nashville harbor.

It is also instructive to note that the Tennessee Supreme Court in *Herbert* approved the exemption for vehicle used for "movement in interstate commerce," as applied in *United Parcel Service, Inc. v. Armold*, 211 Kan. 102, 542 P.2d 694 (1975). In *United Parcel Service*, the court recognized that a carrier, although operating a line wholly within a state, is nevertheless engaged in interstate commerce where the carrier is itself transporting other property or persons which has crossed or will cross state boundaries. The *United Parcel Service* case involved vans and tractor tra ers which were used solely within the State of Kansas to transport parcels traveling in interstate commerce. When brought into the State of Kansas, the transportation units were ready for immediate use in the same form, and were not held back from the normal course of operations. Similarly, even though temporarily at anchor during high water, the *Lenel Bean* was ready for immediate use in the same form and was not

held back from the normal course of operations. Clearly, the normal course of operation of a dredge used in maintaining a navigational channel is that the dredge is actually dredging only when the water is shallow, not during flood stage. It is entirely "normal operation" for a dredge to be anchored during high water, but remaining in a state of readiness to respond when needed.

Numerous cases have specifically held that dredging, dike, revetment and similar activities on navigable rivers constitute engaging in interstate commerce. The case of *Walling v. Patton-Tulley Transportation Co.*, 134 F.2d 945 (6th Cir. 1943), involved employees engaged on dike and revetment construction on the Mississippi River under contracts of their employer with the United States. The court there noted that "the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory . . . . We have no difficulty in concluding that the dike and revetment employees of the appellee were engaged in interstate commerce . . . ." Cases specifically holding dredges to be included in interstate commerce include *Ritch v. Puget Sound Bridge and Dredging Co., Inc.*, 156 F.2d 334 (9th Cir. 1946); *Walling v. Sternberg Dredging Co.*, 64 F. Supp. 758 (E.D. Mo. 1946), *aff'd* 158 F.2d 678 (8th Cir. 1946); and *Cuascut v. Standard Dredging Corp.*, 94 F. Supp. 197 (D.P.R. 1950).

Several decisions have further held that repairmen and watchmen of vessels temporarily removed from service are engaged in interstate commerce. Repairmen and watchmen on vessels temporarily removed from service

while being repaired continued to be engaged in interstate commerce, since the vessels retain their status as instrumentalities of interstate commerce during such times of being temporarily out of service. *Craig v. Heide and Co.*, 94 F. Supp. 442 (E.D.N.C. 1951); *Slover v. Walthen*, 140 F.2d 258 (4th Cir. 1944); *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405 (3d Cir. 1947); and *Divins v. Hazeltime Electronics Corp.*, 163 F.2d 100 (2d Cir. 1947). Since the *Lenel Bean* remained such an instrumentality of interstate commerce while anchoring during high water and since its crew continued to be engaged in interstate commerce, the *Lenel Bean* itself remained exempt from the sales and use tax.

SUMMARY

The Tennessee legislature has exempted vessels such as the *Lenel Bean* from sales and use taxation, and the Tennessee Supreme Court in *Herbert* has construed the exemption to apply even to a vessel which seldom leaves the waters of the State of Tennessee. A dredge is an instrumentality of interstate commerce; the *Lenel Bean* has been used at all times in interstate commerce, never having been used on local or intrastate projects; and has always been maintained in a state of readiness to respond as needed to perform its intended function. Anchoring of the vessel during periods of high water does not remove the vessel from interstate commerce, and the *Lenel Bean* has not been stored for use or consumption in Tennessee.

It is respectfully submitted that the *Lenel Bean* is exempt from Tennessee sales and use taxation.

Respectfully submitted,

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BOYD L. RHODES, JR. (7966)
Attorney for Plaintiff

OF COUNSEL:

HEISKELL, DONELSON, BEARMAN
ADAMS, WILLIAMS & KIRSCH
6750 Poplar Avenue, Suite 308
Memphis, Tennessee 38138
(901) 755-6713

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument has been served on opposing counsel by depositing a copy in the U.S. mail, postage prepaid, this — day of April, 1986.

.....

BLR7A/E8672-03

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

BEAN DREDGING a Louisiana corporation, Plaintiff, v. MARTHA B. OLSEN, Commissioner of Revenue of the State of Tennesee, Defendant.	)	No. 90712-2 R.D.

ANSWERS TO INTERROGATORIES

To: Boyd L. Rhodes, Jr., Esq.
Attorney for Plaintiff
Heiskell, Donelson, Bearman,
Andrews, Williams & Kirsch
6750 Poplar Avenue
Suite 308
Memphis, Tennessee 38138

The following are the answers of the defendant, Donald W. Jackson, successor to Martha B. Olsen, Commissioner of Revenue for the State of Tennessee, to the interrogatories numbered 1 through 22, directed to the defendant, to be answered pursuant to Rule 33 of the Tennessee Rules of Civil Procedure:

Interrogatories

Interrogatory No. 1: State the name and capacity of each person who participated in preparing responses to these interrogatories.

Response No. 1: Fred Bracey, Director, Sales and Use Tax Division. Brenda M. Bibb, Staff Attorney

Interrogatory No. 2: State any facts, other than the auditor's Field Audit Summary, which are the basis for Defendant's determination that the use taxes, penalty, and interest have been imposed properly in this case and that Plaintiff's dredging vessels are legally subject to Tennessee use taxes.

Response No. 2: The barge was stored for a period of four to six months at McKeller Lake in Memphis, Tennessee. The removal of the barge from continuous use in interstate commerce precludes it from being exempt pursuant to T.C.A. § 67-6-321.

Interrogatory No. 3: Identify any taxpayers owning or using vessels or barges in excess of fifty (50) tons displacement used in navigable waters of the state of Tennessee upon whom Defendant has *performed audits* for years subsequent to 1972 of sale or use taxes and identify the vessels or barges against which such audits were made.

Response No. 3: This information cannot be furnished since it is confidential pursuant to T.C.A. § 67-1-1701 et seq.

Interrogatory No. 4: Identify any taxpayers owning or using vessels or barges in excess of fifty (50) tons displacement used in navigable waters of the state of Tennessee upon whom Defendant has *assessed* sales or use taxes for years subsequent to 1972 and identify the vessels or barges against which such assessments were made.

Response No. 4: See Response No. 3.

Interrogatory No. 5: Describe the method of computing the assessment of sales or use taxes on each vessel or barge identified in your answer to Interrogatory No. 4, and state each valuation method, proration factor, or other basis of assessing sales or use taxes on each such vessel or barge.

Response No. 5: See Response No. 3.

Interrogatory No. 6: State the facts which are the basis for Defendant's decision *not to assess* sales or use taxes on each taxpayer, vessel, or barge identified in your answer to Interrogatory No. 3 as having been *audited*, but against which no assessment was made.

Response No. 6: Pursuant to T.C.A. § 67-1-1701 et seq. this material is confidential and cannot be released.

Interrogatory No. 7: As used in the context of sales and use taxation, state Defendant's understanding and definition of the following terms:

(a) displacement
(b) vessels or barges
(c) dredge or dredging plant
(d) localized for use within the state
(e) used in interstate commerce
(f) instrumentality of interstate commerce
(g) continuously used in interstate commerce
(h) come to rest
(i) mass of property
(j) component part
(k) integral part
(l) appropriate type activity to remove from interstate commerce

Response No. 7: a) Displacement is the weight or volume of fluid displaced by a floating body.

b) A barge is a large flat-bottomed boat that is normally unpowered, towed by other crafts and used for transporting freight. A vessel is a craft designed to navigate on water.

c) A dredge or a dredging plant is a machine that is equipped with a scooping device and used to deepen harbors and waterways.

d) "Localized for use within the state" means items that come to rest in this state and become a part of the mass of property in this state.

e) "used in interstate commerce" means items of personal property which enter the state but do not come to rest in this state.

f) "Instrumentality of interstate commerce" includes rolling stock, aircraft and vessels.

g) "Continuously used in interstate commerce" means the constant flow of an item in interstate commerce as discussed in *T. L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

h) "Come to rest" means to become or remain temporarily still as discussed in *T. L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

i) "Mass of property" is any and all property located in the State of Tennessee as discussed in *T. L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976).

j) Component part is a fundamental part of a system.

k) Integral part is a part essential for the completeness of something.

l) "Appropriate type activity to remove from interstate commerce" is loading or unloading cargo.

Interrogatory No. 8: State under what facts and circumstances Defendant considers vessels or barges in excess of fifty (50) tons displacement which have come to rest within the territory of Tennessee and which have become a part of the mass of property used in Tennessee nevertheless to be exempt from the tax imposed by the Retailer's Sales Tax Act, T.C.A. § 67-6-101 *et seq.*

Response No. 8: None.

Interrogatory No. 9: State whether Defendant considers it necessary for a vessel or barge in excess of fifty (50) tons displacement to physically leave the waters of the state of Tennessee in order to be exempt from the sales and use tax.

Response No. 9: Yes, if they are continuously used in rivers or waterways for the purposes of interstate commerce.

Interrogatory No. 10: Identify each taxpayer and each vessel or barge in excess of fifty (50) tons displacement which Defendant has subjected to sales or use taxation as a result, in whole or in part, of such vessel or barge being dry docked or tied up while undergoing repair services in the state of Tennessee.

Response No. 10: This information is confidential pursuant to T.C.A. § 67-1-1701 et seq. and cannot be revealed.

Interrogatory No. 11: State whether and to what extent Defendant considers the taxation of component parts of vessels or barges in excess of fifty (50) tons displacement to depend upon whether the component part is installed or affixed outside the state of Tennessee or inside the state of Tennessee.

Response No. 11: If the component part is installed in the State of Tennessee, it is taxable.

Interrogatory No. 12: State under what facts and circumstances Defendant *does not* assess a penalty on any deficiency in sales and use taxes.

Response No. 12: Penalty would not be assessed based upon the guidelines set forth in T.C.A. § 67-1-802. If penalty is assessed it may be waived under the criteria set forth in T.C.A. § 67-1-803.

Interrogatory No. 13: State how long a vessel or barge in excess of fifty (50) tons displacement may be tied up or docked in Tennessee before Defendant deems such vessel or barge to be outside the exemption of T.C.A. § 67-3012(8)(a) [now T.C.A. § 67-6-321].

Response No. 13: Any interval in which a vessel or barge is withdrawn from interstate commerce.

Interrogatory No. 14: State whether and to what extent your answer to Interrogatory No. 13 would vary if the reason the vessel or barge is tied up or docked is:

(a) for repairs.
(b) to offload cargo.
(c) to load cargo.
(d) to await assignment.
(e) due to unavailability of work.
(f) due to seasonal nature of the work performed or cargo handled by such vessel or barge.
(g) due to weather conditions.
(h) due to navigational conditions.
(i) due to unavailability of crew members.

Response No. 14: a) for repairs: would still be taxble (sic).

b) to offload cargo: would be exempt as part of interstate commerce.

c) to load cargo: would be exempt as interstate commerce.

d) to await assignment: would be taxable.

e) due to unavailability of work: would be taxable.

f) due to seasonal nature of the work performed or cargo handled by such vessel or barge: would be taxable.

g) due to weather conditions: would be exempt as interstate commerce.

h) due to navigational conditions: would be exempt as interstate commerce.

i) due to unavailability of crew members: would be taxable.

Interrogatory No. 15: State the facts which are the basis for Defendant's denial of Paragraph 12 of the Complaint.

Response No. 15: The barge was withdrawn from dredging the Mississippi River and stored in Tennessee for maintenance activities.

Interrogatory No. 16: State the facts which are the basis for Defendant's denial of Paragraph No. 13 of the Complaint.

Response No. 16: The taxable incident occurred when the vessel was withdrawn from interstate commerce and stored in Tennessee.

Interrogatory No. 17: State the facts which are the basis for Defendant's denial of Paragraph No. 14 of the Complaint.

Response No. 17: During the maintenance activities, the barge did not comply with the requirement of the statute for use in interstate commerce.

Interrogatory No. 18: State the names and addresses of each person who has knowledge or information that facts stated in your answer to Interrogatory No. 15 are true in whole or in part.

Response No. 18: 1) Virginia Adams, Auditor
Tennessee Department of Revenue
500 Deaderick Street
Andrew Jackson State Office Building
Nashville, TN 37242

2) Alene Gaines, Auditor
1705 Harrison Pike
Cleveland, TN 37311

3) John Cathcart, Audit Supervisor
Tennessee State Office Building
2nd Floor West
540 McCallie
Chattanooga, TN 37402

4) Stephen Henley, Asst. Chief of Field Audit
Tennessee Department of Revenue
Andrew Jackson State Office Building
Nashville, TN 37242

5) Jim McLeod, Chief of Field Audit
Tennessee Department of Revenue
Andrew Jackson State Office Building
Nashville, TN 37242

6) John Wainscott, Assistant Director
Sales and Use Tax Division
Tennessee Department of Revenue
Andrew Jackson State Office Building
Nashville, TN 37242

7) John R. Gregory
former Director of Sales & Use Tax Division
Heiskell, Donelson, Bearman, Adams, Williams and Kirsch
6750 Poplar Avenue,
Suite 308
Memphis, TN 38138

8) Fred Bracey, Director
Sales and Use Tax Division
Tennessee Department of Revenue
Andrew Jackson State Office Building
Nashville, TN 37242

Interrogaotory No. 19: State the names and addresses of each person who has knowledge or information that facts stated in your answer to Interrogatory No. 16 are true in whole or in part.

Response No. 19: See Response No. 18.

Interrogatory No. 20: State the names and addresse of each person who has knowledge or information that facts stated in your answer to Interrogatory No. 17 are true in whole or in part.

Response No. 20: See Response No. 19.

Interrogatory No. 21: With respect to all witnesses who you will or may call as experts to give opinion testimony at the trial of this matter, state the following:

(a) Name and address:

(b) Name and address of each witness' employer or the organization with which the witness is associated in any professional capacity:

(c) The field in which the witness is to be offered as an expert:

(d) A summary of witness' qualifications within the field in which the witness is expected to testify:

(e) The substance of the facts to which the witness is expected to testify:

(f) The substance of the opinions as to which the witness is expected to testify and the summary of the grounds for each opinion:

(g) State the dates and addresses of all reports rendered by such experts: and

(h) Identify by date, author, and location any document relied upon by each such expert witness to support any opinion or fact which each such expert may be expected to testify, and identify each opinion and fact to which each document relate:

Response No. 21: None.

Interrogatory No. 22: State the names and addresses of each person, other than the auditors, Alene G. Gaines and Virginia N. Adams, who has knowledge or information that facts stated in your answer to Interrogatory No. 2 are true in whole or in part.

Response No. 22: See Response No. 18.

STATE OF TENNESSEE

DAVIDSON COUNTY

Fred Bracey, being duly sworn upon his oath deposes and says:

1. I am the Director of the Sales and Use Tax Division on the staff of Donald W. Jackson, Commissioner of Revenue for the State of Tennessee, the successor defendant in the above entitled action, and I am the agent of said Commissioner for the purpose of answering the interrogatories numbered 1, 2, 5, 7-9, 11, 13-22 served upon the Commissioner by plaintiff, Bean Dredging Corporation, on March 8, 1985, and for making this verification.

2. I have read the said interrogatories and the foregoing answers thereto are true according to the best of my knowledge, information and belief.

/s/ Fred Bracey
Director Sales and Use Tax
Division
April 3, 1985
Date

Subscribed and sworn to before me this the 3rd day of April, 1985.

/s/ Maxwell C. Green
Notary Public

My Commission Expires: July 21, 1985

STATE OF TENNESSEE

DAVIDSON COUNTY

Brenda M. Bibb, being duly sworn upon her oath deposes and says:

1. I am a Staff Attorney on the staff of Donald W. Jackson, Commissioner of Revenue for the State of Tennessee, the successor defendant in the above entitled action, and I am the agent of said Commissioner for the purpose of answering the interrogatories numbered 3, 4, 6, 10, and 12 served upon the Commissioner by plaintiff, Bean Dredging Corporation, on March 8, 1985, and for making this verification.

2. I have read the said interrogatories and the foregoing answers thereto are true according to the best of my knowledge, information and belief.

/s/ Brenda M. Bibb
Staff Attorney
April 3, 1985

Date

Subscribed and sworn to before me this the 3rd day of April, 1985.

/s/ Maxwell C. Green
Notary Public
My Commission Expires: July 21, 1985

STATE OF TENNESSEE

CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

(Filed December 13, 1983)

SUMMONS IN A
CIVIL ACTION

Heritage Plaza,
Suite 1700
Metarie, Louisiana

File No. ———— R. D.

Bean Dredging Corporation — Home Address

Business Address

Home Address

Business Address

PLAINTIFF(S)

VS

Martha B. Olsen, Commissioner
of Revenue of State of Tennessee

DEFENDANT(S)

TO THE DEFENDANT:
Martha B. Olsen

Home Address:

Business Address:
Andrew Jackson
State Office
Building,
Nashville, TN
37242

You are hereby summoned and required to defend a civil action by filing your answer with the Clerk and Mas-

ter of the Court and serving a copy of your answer to the Complaint on Boyd L. Rhodes, Jr., Plaintiff(s)' attorney, whose address is 2000 First Tennessee Bank Bldg., Memphis, TN 38103 within THIRTY (30) DAYS after this summons has been served upon you, not including the day of service. If you fail to do so, a judgment by default may be taken against you for the relief demanded in the Complaint. ISSUED ——————————, 19——.

JOHN C. ROBERTSON, CLERK and MASTER

By ——————————————————

Deputy Clerk and Master

* * *

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

SUMMONS IN CIVIL ACTION

BEAN DREDGING CORPORATION, a Louisiana Corp.,	NO. ——— R. D.
PLAINTIFF(S)	Came to hand ——
VS	Boyd L. Rhodes, Jr., Solicitor for Plaintiff(s)
MARTHA B. OLSEN, Commission (sic) of Revenue of the State of Tennessee,	No. 7966
DEFENDANT(S)	Telephone No. (901) 526-2000

COST BOND

(Filed December 13, 1983)

WE, BEAN DREDGING CORPORATION as principal, and HEISKELL, DONELSON, BEARMAN, ADAMS, WILLIAMS & KIRSCH as surety, acknowledge ourselves indebted to Chancery Court of Shelby County, Tennessee in the sum of Two Hundred and Fifty Dollars, to be void if the said Bean Dredging Corporation plaintiff in a complaint which has this day been filed in the Chancery Court of Shelby County, against the said Martha B. Olsen, Commissioner of Revenue of the State of Tennessee, Defendant shall pay all costs as may be awarded against Plaintiff by the court in its decrees and orders in said cause.

This the 29th day of November A.D. 1983.

BEAN DREDGING CORPORATION

By: /s/ Boyd L. Rhodes, Jr.
Attorney in Fact
HEISKELL, DONELSON, BEARMAN, ADAMS, WILLIAMS & KIRSCH

By: /s/ Boyd L. Rhodes, Jr.

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

BEAN DREDGING CORPORATION, a Louisiana corporation,	)	
Plaintiff,	)	NO. ————
V.	)	
MARTHA B. OLSEN, Commissioner of Revenue of the State of Tennessee,	)	
Defendant.	)	

COMPLAINT

(Filed December 13, 1983)

Comes now the Plaintiff, Bean Dredging Corporation, Inc., a Louisiana corporation, by and through its attorney of record, Boyd L. Rhodes, Jr., and would respectfully show unto the Court that:

1. Plaintiff is a Louisiana corporation, with its principal office at Heritage Plaza, Suite 1700, Metarie, Louisiana.

2. Defendant Martha B. Olsen is sued in her official capacity as Commissioner of Revenue for the State of Tennessee.

3. Plaintiff brings this action pursuant to Tennessee Code Annotated § 67-2301 *et seq.* and specifically T.C.A. § 67-2305, for the recovery of taxes and interest in the amount of Five Hundred Seventy-One Thousand Five

Hundred Fifty-Two and 43/100 Dollars ($571,552.43) erroneously assessed and collected by the Defendant.

4. Plaintiff's principal business is the performance of dredging operations on various waterways. Sundry types of dredging vessels are employed by the Plaintiff in the course of its work. Plaintiff's services are required most often during low water level periods. Because of the seasonal nature of high and low water levels, it is often necessary to dock the dredging vessels during periods of high water. During the period from January 1, 1980 to December 31, 1982, Plaintiff performed dredging operations on the Mississippi River under three contracts with the United States Corps of Engineers. In the course of these operations, Plaintiff's dredging vessels moved in and out of the States of Tennessee, Arkansas, Mississippi and Louisiana. During the high water periods Plaintiff's dredging vessels were docked in Memphis, Tennessee.

5. Defendant submitted an assessment to Plaintiff requiring payment of use tax for the period from January 1, 1980, to December 31, 1982, in the amount of Five Hundred Thirty-Three Thousand One Hundred Thirty-Three and No/100 Dollars ($533,133.00) plus penalty in the amount of One Hundred Thirty-Three Thousand Two Hundred Eighty-Four and No/100 Dollars ($133,284.00) and interest in the amount of Sixty-Six Thousand Six Hundred Forty-Two and No/100 Dollars ($66,642.00) for a total assessment of Seven Hundred Thirty-Three Thousand Fifty-Nine and No/100 Dollars ($733,059.00).

6. The assessment was subsequently revised, and payment was demanded in the following amounts: use tax in the amount of Four Hundred Thousand Thirty-Seven and

41/100 Dollars ($400,037.41) plus penalty in the amount of One Hundred Thousand Nine and 35/100 Dollars ($100,009.35) and interest in the amount of Seventy-One Thousand Five Hundred Five and 67/100 Dollars ($71,505.67), for a total assessment of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars ($571,552.43).

7. The assessment was made relative to the following vessels and instruments used by Plaintiff in the performance of its interstate operations:

A. The LENEL BEAN. The LENEL BEAN is a self-propelled, dust pan suction dredge. Its gross displacement is one thousand three hundred eighty-five (1,385) short tons. Its length, according to Coast Guard Registration No. 297573, is two hundred forty-five and five-tenths (245-5/10) feet, its width is forty (40) feet, and its depth is eight point six (8.6) feet.

B. The RICHELLE. The RICHELLE is a derrick barge. Its gross displacement is one hundred thirty-four (134) short tons. Its length, according to Coast Guard Registration No. 612597, is fifty-eight and one-tenth (58.1) feet, its width is thirty (30) feet, and its depth is five and five-tenths (5.5) feet.

C. The TENDER ROBYN. The TENDER ROBYN is a survey boat. Its gross displacement is thirty-three point twenty-five (33.25) short tons. Its length, according to Coast Guard Registration No. 603063, is thirty-eight and four-tenths (38.4) feet, its width is sixteen (16) feet, with its depth being five (5) feet.

D. The RECON IV. The RECON IV is a crew boat. Attached hereto as collective Exhibits "B-1" through

"B-9" inclusive, are receipts showing Louisiana sales taxes have been previously paid on the RECON IV in the amount of One Thousand Two Hundred Sixty-Five and 60/100 Dollars ($1,265.60).

8. Also included in the assessment were:

A. *Barges 1601-1620.* These barges in fact are floating pontoons which are bolted or welded upon the LENEL BEAN. These pontoons constitute the pipeline through which the dredged material is displaced.

B. *Three drum hoist.* The three drum hoist is bolted onto the LENEL BEAN. It serves the function of hoisting the suction pipeline.

Without the pipeline and the three drum hoist, the LENEL BEAN would be unable to perform the essential task for which it is used. For this reason these integral component parts of the LENEL BEAN should be subject to taxation only as a part of the LENEL BEAN.

9. On August 18, 1983, Plaintiff paid, under protest, the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars ($571,552.43) by check to an agent of Defendant in payment of the aforesaid assessment. The check had the words "Paid Under Protest" typed on its face. By letter accompanying such payment, Plaintiff further notified Defendant that payment was made under protest. A copy of the check marked "Paid under protest" is attached hereto as Exhibit "A" and incorporated herein by reference.

10. At all times for which the tax was assessed there was in full force and effect T.C.A. §§ 67-3001 through 3056 and specifically T.C.A. §§ 67-3003 and 67-3005.

11. T.C.A. § 67-3008 expressly provides that the use tax is not imposed on property used within this state upon which a like tax equal to or greater in amount has been paid in another state. For this reason, the use tax imposed on the RECON IV is erroneous, illegal and void.

12. Pursuant to T.C.A. § 67-3012(8)(a) which specifically exempts the use of vessels or barges of fifty tons and more displacement so long as they are being used in interstate commerce, the vessels used by Plaintiff in excess of fifty tons of displacement are exempt from taxation and any imposition of use taxes on these vessels is erroneous, illegal and void.

13. The imposition of use taxes by the State of Tennessee on dredging vessels used in interstate commerce within and without this State is an unconstitutional encroachment on the power of the Congress of the United States to regulate commerce among the several states under Article I, Section 8 of the United States Constitution.

14. For the above reasons and others, Plaintiff is not and has not been subject to use taxes pursuant to the laws of the State of Tennessee on the use of the dredging vessels used in interstate commerce and, therefore, the assessment, payment and collection of the said Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars ($571,552.43) of tax, penalty and interest on said dredging vessels were erroneous, illegal, void, and without any legal basis.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That the Defendant be required to answer this Complaint.

2. That the Court declare that the Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars ($571,552.43) paid to Defendant by Plaintiff as use tax, penalty and interest for the dredging vessels used in interstate commerce by Plaintiff was erroneously assessed and collected.

3. That it have judgment against the Defendant in the amount of Five Hundred Seventy-One Thousand Five Hundred Fifty-Two and 43/100 Dollars ($571,552.43) or other such amount as the Court determines has been erroneously collected from the Plaintiff by Defendant, plus interest in the amount of fourteen percent (14%) or such other interest as determined reasonable and appropriate and that such interest awarded by this Court shall be computed from August 18, 1983.

4. In the event that the Court determines that the Plaintiff is not entitled to the relief as hereinbefore requested, Plaintiff requests that, because of the close nature of the questions presented, the Court determine that no interest and penalty should have been charged on the State's assessment.

5. That it have such other and further relief as it may be entitled to.

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS AND KIRSCH

By: /s/ Boyd L. Rhodes, Jr. (7966)

By: /s/ Kent Wunderlich (7987)

2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

Cost Bond

We acknowledged ourselves sureties in this action for costs not to exceed $250.00.

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH

By: /s/ Boyd L. Rhodes, Jr.

EXHIBIT "A"

Bean Dredging Corporation — Remittance Advice

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

Invoice Date	Invoice Number	Net Amount
8-17-83		$571,552.43

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

Bean Dredging Corporation — Control Number 36725

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

First National Bank of Commerce New Orleans, Louisiana	14-2 650	Date 8-17-83	Check No. 36725	Amount $571,552.43

Pay Exactly $571,552 Dollars and 43 Cents To the Order of:

Tennessee Department of Revenue

/s/ Meredith H. Bean

PAID UNDER
PROTEST

(All of remaining Exhibits omitted in printing)

Law Offices

HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH
A Professional Corporation
Twentieth Floor
First Tennessee Building
Memphis, Tennessee 38103

---

(901) 526-2000

Leo Bearman
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Frierson M. Graves, Jr.
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Anne S. McPherson
H. Elizabeth Akins

Counsel
J. H. Shepherd
Robert M. Burton

A. L. Heiskell 1890-1980
E. B. Williams, Jr. 1899-1972

August 18, 1983

Tax Enforcement Division
Tennessee Department of Revenue
P. O. Box 3287, Uptown Station
Nashville, Tennessee 37219
ATTEN: Ruth Hesson

RE: BEAN DREDGING CORPORATION
(Account # 2-720505712-001-3)
Sales and Use Tax January 1, 1980, to December 31, 1982

Dear Agent Hesson:

Enclosed is Bean Dredging Corporation check number 36725 in the amount of Five Hundred Seventy-one Thousand Five Hundred Fifty-two Dollars Forty-three cents ($571,552.43) in payment of the tax, penalty, and interest reflected in Notice of Assessment and Demand of Payment dated July 25, 1983, from the Tennessee Department of Revenue.

This payment of tax, interest, and penalty is *PAID UNDER PROTEST.*

Please acknowledge receipt of the enclosed check and of the fact that the taxpayer has PAID UNDER PROTEST by executing and returning the enclosed copy of this letter.

Very truly yours,

Boyd L. Rhodes, Jr.

BLR/mkr
Enclosure

CC: Mr. John R. Gregory, Director
Sales and Use Tax Division
Tennessee Department of Revenue
Andrew Jackson State Office Building
Nashville, Tennessee 37242

BBC: Mr. Bob Tarcza
Attorney at law

RECEIVED AND ACKNOWLEDGED this — day of August, 1983.

Tennessee Department of Revenue

By: .....

Title: .....

Bean Dredging Corporation

Remittance Advice

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

Invoice Date	Invoice Number	Net Amount
8-17-83		$571,552.43

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

Bean Dredging Corporation

Control Number
36725

One Shell Square
Suite 3700
New Orleans, Louisiana 70139

BEAN

TAX, INTEREST, & PENALTY
PAID UNDER PROTEST

First National Bank of Commerce New Orleans, Louisiana	14-2 650	Date 8-17-83	Check No. 36725	Amount $571,552.43

Pay Exactly $571,552 Dollars and 43 Cents To the Order of:

Tennessee Department of Revenue

/s/ Meredith H. Bean

PAID UNDER
PROTEST

(SEAL)

STATE OF TENNESSEE
DEPARTMENT OF REVENUE
ANDREW JACKSON STATE OFFICE BUILDING
NASHVILLE, TENNESSEE 37242

July 25, 1983

CERTIFIED MAIL

In reply refer to
FILE: JOMcL

Bean Dredging Corp.
One Shell Square, Suite 3700
New Orleans, La. 70139

Audit No: 3010572
Debit No: 0206
2 720505712 001 3
Acct. No:

Gentlemen:

TYPE PAYMENT: 1

Auditors of this Division have completed and reviewed an audit of your books and records indicating that there is a deficiency in the payment of Sales and/or Use Tax due the State of Tennessee for the period of January 1, 1980 to December 31, 1982 inclusive. This deficiency is made up in the following amount of tax, penalty and interest:

	REVISED ASSESSMENT
Tax	$ 400,037.41
Penalty	100,009.35
Interest	71,505.67
TOTAL CK CA CD	$ 571,552.43

This is a Notice of Assessment and a Demand for Payment. Accordingly, you have until August 8, 1983 to pay this assessment or to show cause why the above amount of tax, penalty and interest is not due at this time. In the event payment is not made and you do not present facts to

show why the amount is not due before that time, the Department will be required to proceed to collect it by means available to it. Interest will continue to accrue until paid.

Please submit attached copy of this letter with your payment.

Very truly yours,

/s/ JOHN R. GREGORY, DIRECTOR
Sales & Use Tax Division

JRG:JOMcL:dp